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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA

REPORT OF THE PREPARATORY COMMISSION, UNDER PARAGRAPH 11 OF RESOLUTION I OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, ON ALL MATTERS WITHIN ITS MANDATE, EXCEPT AS PROVIDED IN PARAGRAPH 10, FOR PRESENTATION TO THE ASSEMBLY OF THE INTERNATIONAL SEABED AUTHORITY AT ITS FIRST SESSION

VOLUME X

Part One

Provisional final report of Special Commission 2

Part Two

Statements to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission

Part Three

Other documents relating to the work of Special Commission 2

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PART ONE

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
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FOR THE LAW OF THE SEA

CONSOLIDATED PROVISIONAL FINAL REPORT

VOLUME I

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Chapter III

PROVISIONAL FINAL REPORT OF SPECIAL COMMISSION 2*

A. Mandate of the Special Commission

197. The Special Commission for the Enterprise, Special Commission 2, was established in accordance with resolution I, paragraph 8, of the United Nations Convention on the Law of the Sea. Under resolution I, paragraph 8, the Special Commission for the Enterprise is entrusted with the task of:

(a) Taking all measures necessary for the early entry into effective operation of the Enterprise;

(b) Performing the functions referred to in paragraph 12 of resolution II.

198. Paragraph 12 of resolution II of the United Nations Convention on the Law of the Sea, in its chapeau, establishes the objective of ensuring that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with States and other entities. To that end, it requires that

"(a) every registered pioneer investor shall:

(i) carry out exploration, at the request of the Commission, in the area reserved, pursuant to paragraph 3 in connection with its application, for activities in the Area by the Authority through the Enterprise or in association with developing States, on the basis that the costs so incurred plus interest thereon at the rate of 10 per cent per annum shall be reimbursed;

(ii) provide training at all levels for personnel designated by the Commission;

(iii) undertake before the entry into force of the Convention, to perform the obligations prescribed in the Convention relating to transfer of technology;

"(b) every certifying State shall:

(i) ensure that the necessary funds are made available to the Enterprise in a timely manner in accordance with the Convention, upon its entry into force; and

(ii) report periodically to the Commission on the activities carried out by it, by its entities or natural or juridical persons."

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* This chapter is a revised version of the report which originally appeared in document LOS/PCN/SCN.2/1992/CRP.6.

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B. Programme of work

199. The Special Commission commenced its work under the chairmanship of Mr. Lennox Ballah of Trinidad and Tobago with the adoption of its programme of work contained in document LOS/PCN/SCN.2/1984/CRP.1 and decided to give first priority to its consideration of the application of paragraph 12 of resolution II, and consideration of the preparatory measures that could be undertaken in accordance with the provisions of that paragraph; secondly, to a consideration of the structure of the Enterprise, and in particular, the structure and requirements for its start-up and establishment; and thirdly, to an examination of operational options, beginning with an evaluation of the joint venture option for the initial operation of the Enterprise, as follows:

(1) Application of resolution II, paragraph 12, including:

  (a) Development of a training scheme;

  (b) Other measures to be taken under paragraph 12;

(2) Establishment of the organizational structure of the Enterprise:

  (a) Draft rules of procedure of the Governing Board;

  (b) Draft Staff Rules;

  (c) Draft Financial Rules;

  (d) Establishment of the principal office of the Enterprise;

  (e) Administrative and financial arrangements;

(3) Development of policies and feasibility studies in preparation for the early entry into effective operation of the Enterprise:

  (a) Elaboration of operational options;

  (b) Project formulation;

  (c) Supplementary procedures for the conduct of operations;

(4) Formulation of recommendations for the initial operation and administration of the Enterprise;

(5) Other questions, including:

  (a) Coordinative arrangements for dealing with matters relating also to the work of other bodies of the Preparatory Commission;

  (b) Establishment of an information programme on seabed resource development, including, in particular, an information system on technology suppliers.

200. Item (4) in the programme of work was recognized as mostly being a distillation of the conclusions that would be reached in the course of work on items (1), (2) and (3). With regard to item (5), it was understood that the need for coordination with other bodies would be addressed as and when necessary, and that the requirement for an information programme on seabed resource development, as indicated in item (5) (b), would be identified in the course of the Special Commission's future work. 3/

201. The Special Commission initially envisaged its work as encompassing the full range of preparatory work needed to facilitate the implementation of the Convention and to assure the ability of the Enterprise "to keep pace" with registered pioneer investors, in the event that seabed mining was ready to commence at the time of entry into force of the Convention. It thus adopted a comprehensive approach which would allow it to produce a detailed set of generally applicable recommendations and draft rules as to the organizational structure, policies, management and operations of the Enterprise, as well as a set of distinct recommendations with respect to the initial operations and administration of the Enterprise, recognizing the need to allow for evolution. 4/ This approach also determined the scope and content of its initial working papers. 5/

202. As a result of the decision taken by the Preparatory Commission that the General Committee should act on its behalf as the executive organ for the administration of resolution II, the special preparatory functions set forth in paragraph 12 of resolution II, with the exception of the development of a training scheme, were dealt with outside Special Commission 2. 6/

203. It must be noted also that the likelihood of the entry into force of the Convention being coincidental with the economic viability of a seabed mining industry was increasingly questioned. This affected the approach adopted by the Special Commission and the priorities accorded to the different elements of its work. During the resumed fourth session (1986, New York), when it became clear that the prospects for seabed mining were unfavourable and that there was little likelihood of its coincidence with the entry into force of the Convention, certain modifications in the programme of work of the Special Commission were introduced. Several of these modifications reflected a new understanding of the general scope and content of the recommendations that the Special Commission could most usefully make to ensure "early entry into effective operation of the Enterprise" (its mandate under resolution I) and its ability to keep pace with the activities of pioneer investors (its mandate under resolution II). Three sufficiently distinct sets of recommendations were therefore contemplated:

(a) Those that addressed the first operations of the Enterprise and that would necessarily need to take account of the economic conditions for seabed mining;

(b) Those that dealt with basic administrative, management and procedural matters, that would be unaffected by the timing of operations and that would permit the Enterprise to function as a distinct entity, without unnecessary delay;

/...

(c) Those that addressed the implementation of paragraph 12 of resolution II and that may or may not be organically linked to recommendations on the first operation. 7/

204. Of particular note was the Special Commission's introduction of a special mechanism (the Chairman's Ad Hoc Advisory Group on Assumptions) to monitor economic factors pertinent to the question of seabed mining viability. That need, shared also by Special Commission 1, had not been envisaged at the outset. Also notable was its general conclusion that virtually any concrete recommendation it could make on both operational and organizational matters would need to be revised as and when economic prospects for mining improved. 8/

205. As a result, from 1986 to the present, the work of Special Commission 2 focused on the following: development and establishment of a training programme; organizational structure of the Enterprise and consideration of a recommendation regarding a pre-operational Enterprise; operational options of the Enterprise including project feasibility analysis, an agreed set of working assumptions and the initial operation of the Enterprise.

C. Concise summary of the overall accomplishments of the Special Commission

1. Application of resolution II, paragraph 12

(a) Development of a training scheme

206. With respect to its mandated functions under resolution II, the Special Commission, from the beginning, paid special attention to the need to organize a training scheme. While the basic design of the training programme was grounded on the scope of the training obligation of the pioneer investors, Special Commission 2 began to introduce an important distinction in its work as between the formulation of basic planning guidelines and modalities for a training programme, and decisions as to its actual implementation.

207. An Ad Hoc Working Group on Training with a mandate to draft the principles, policies, guidelines and procedures for a Preparatory Commission training programme was established by the Special Commission during the fifth session of the Preparatory Commission (1987, Kingston). Conscious of the need to reflect all interests and views, it was agreed that the Ad Hoc Working Group on Training would include the four pioneer investors (USSR, France, Japan and India), Canada, Italy, China, Kenya, Tunisia, Bangladesh, Malta, Colombia, Jamaica, provisionally Denmark, the United Nations Council for Namibia and a representative from the International Ocean Institute. 9/ At the resumed sixth session (1988, New York), the Ad Hoc Working Group on Training submitted to the Special Commission document LOS/PCN/SCN.2/1988/CRP.3 entitled "Principles and policies for a training programme to be instituted by the Preparatory Commission". At the seventh session (1989, Kingston), it submitted to the Special Commission document LOS/PCN/SCN.2/1989/CRP.4 entitled "Draft guidelines and procedures for the implementation of the training programme". Special Commission 2 concluded that there was basic agreement on the documents and that they provided the basis for its work on training. 10/ Following a request by

the Special Commission, these documents went through a few drafting changes to become document LOS/PCN/SCN.2/L.6/Rev.1, "Principles, policies, guidelines and procedures for a Preparatory Commission training programme".

208. LOS/PCN/SCN.2/L.6/Rev.1 was adopted first by Special Commission 2 and then by the Preparatory Commission during the resumed seventh session (1989, New York). During the eighth session (1990, Kingston) the Preparatory Commission adopted LOS/PCN/SCN.2/L.7, "Implementation of the Preparatory Commission Training Programme. Recommendations of Special Commission 2".

209. During the ninth session (1991, Kingston) the Training Panel was constituted, with 21 members selected on the basis of the principle of equitable geographical distribution and including one expert from each of the registered pioneer investors. 11/ The Preparatory Commission appointed the Chairman of Special Commission 2 as an ex officio member of the Training Panel. The Panel held its first meeting during the resumed ninth session (1991, New York) and decided that traineeships should cover five engineering disciplines (chemical/metallurgical, electrical, electronic, mechanical and mining), marine geology, marine geophysics and marine ecology, as set forth in LOS/PCN/BUR/R.9. Documents LOS/PCN/SCN.2/L.7 and LOS/PCN/BUR/R.9 are reproduced in volume 4.

210. At the tenth session (1992, Kingston), the Training Panel met for the second time and approved the training programmes offered by France and Japan (each of which was for three traineeships, starting in November 1992 and May 1993 respectively). It established the minimal qualifications of applicants for the training programme, developed criteria for selecting candidates and approved a note verbale announcing the training programmes of France and Japan. 12/ The Training Panel met during the first week of the resumed tenth session (1992, New York). At that session, it selected six candidates for the programmes offered by Japan and France from 67 applications and approved the revised training programmes offered by India and the Russian Federation, both of which are to start in October 1993.

211. At the fourth meeting of the Training Panel (1993, Kingston), the Panel approved the training programmes of China and the Interoceanmetal Joint Organization (Bulgaria, Cuba, the Czech and Slovak Federal Republic and the Russian Federation). It selected five candidates for the traineeships under the training programmes offered by India and the Russian Federation and deferred the selection of a candidate for the traineeship in chemical engineering offered under the training programme of India in the absence of a qualified candidate. The Training Panel also reviewed the training programme offered by Germany, requesting further details on the type of training to be offered, the disciplines involved and the need for that programme to conform to the format of the programmes which had already been adopted, and took note of the information provided by the delegation of France with regard to the implementation of its training programme. 13/

212. In accordance with step 1, paragraph (c), of LOS/PCN/SCN.2/L.7, the Panel requested the Division for Ocean Affairs and the Law of the Sea to make inquiries with other technologically advanced States and institutions about educational and training facilities in areas relevant to seabed and ocean exploration, including those relating to the monitoring of deep seabed

environments, and to submit this information for the consideration of the Panel at its next meeting.

213. At its fifth meeting, the Training Panel will, inter alia, select one trainee for the traineeship in chemical engineering under the Indian training programme, select eight candidates for the training programmes of China and the Interoceanmetal Joint Organization, examine the revised training programme of Germany with a view to circulating a note verbale announcing that programme, consider the progress reports on those training programmes that are being implemented, consider the format for the training certificates to be issued to successful trainees by the Preparatory Commission and consider the report by the Secretariat on the educational and training facilities in other technologically advanced States relevant to seabed and ocean exploration.

(b) Other measures to be taken under paragraph 12

214. The other measures under paragraph 12 of resolution II required that:

(a) Every registered pioneer investor should:

(i) Carry out exploration, at the request of the Commission, in the area reserved for activities by the Authority through the Enterprise or in association with developing States, on the basis that the costs so incurred plus interest thereon at the rate of 10 per cent per annum shall be reimbursed;

(ii) Undertake, before the entry into force of the Convention, to perform the obligations prescribed in the Convention relating to transfer of technology;

(b) Every certifying State should:

(i) Ensure that the necessary funds are made available to the Enterprise in a timely manner in accordance with the Convention, upon its entry into force;

(ii) Report periodically to the Commission on the activities carried out by it, by its entities or natural or juridical persons.

215. As noted earlier, with the exception of the establishment of a training scheme, the special preparatory functions set forth above were assigned to the General Committee. The Special Commission did, however, note the important linkage between the exploration of the Authority's reserved area and the Preparatory Commission's training programme and made a recommendation to take account of this linkage for the transitional pre-operational period (see sect. III.4 below).

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2. Establishment of the organizational structure of the Enterprise

216. As early as its initial exchange on the Enterprise's organizational structure and given its perception of present and predicted economic conditions, the Special Commission called for a pragmatic approach to planning for the "early entry into effective operation of the Enterprise" and stressed that the initial Enterprise might best be regarded as a nucleus establishment capable, however, of maturing quickly under favourable operating conditions. 14/

217. At the request of the Special Commission in 1984, document LOS/PCN/SCN.2/WP.2, entitled "The Enterprise - start-up requirements and preparatory measures", was prepared to facilitate its work in this regard. As a result of its discussion on this working paper, the Special Commission recognized the need to elaborate a possible structure and organization for the Enterprise that took into account the extent to which operational modalities would affect organizational matters, and also the need to establish the Enterprise with a minimal and flexible arrangement that would enable it to respond to favourable operating circumstances.

218. An outgrowth of the discussions of LOS/PCN/SCN.2/WP.2 was an additional request concerning the development of an expert team for the Enterprise and the process for facilitating their recruitment by the Enterprise. Document LOS/PCN/SCN.2/WP.7, entitled "Development of an ad hoc expert core group for the Enterprise to assist the Preparatory Commission", was prepared in response to this request. At the resumed fourth session (1986, New York), the Special Commission requested a new working paper that would be useful in a discussion of an initial "nucleus" Enterprise should delays in the projected start-up of seabed mining persist at the time of the establishment of the Enterprise. A "nucleus" Enterprise would be recommended in order to provide for continued pre-feasibility work. 15/

219. The working paper prepared by the Secretariat at the Special Commission's request, LOS/PCN/SCN.2/WP.12, entitled "A nucleus Enterprise", bore a resemblance, in terms of functions, to the earlier notion of a "core expert group" contained in document LOS/PCN/SCN.2/WP.7. The report contained provisions on the monitoring, evaluation and continued preparatory functions that would need to be performed in the pre-feasibility period, as well as provisions regarding the necessity of keeping personnel and costs down to a minimum during that period. In addition, the Special Commission requested a working paper on the general framework provided in annex IV to the Convention which contains the Statute of the Enterprise. 16/ Working paper LOS/PCN/SCN.2/WP.16 of 22 February 1989, entitled "Provisions of the Convention relating to the structure and organization of the Enterprise", was the response to this request.

220. Special Commission 2 started consideration of working paper LOS/PCN/SCN.2/WP.16 during the seventh session (1989, Kingston). In its consideration of this working paper, the Special Commission set as its purpose: to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretation; to suggest additional draft provisions to facilitate effective application; and to suggest additional

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draft rules on matters such as the confidentiality requirement, on which the Convention has no rule relating to the Enterprise.

221. The Special Commission completed its discussions of working paper LOS/PCN/SCN.2/WP.16 at the ninth session (1991, Kingston) and requested the Secretariat to issue a new paper which would not only incorporate the provisions of the Convention relating to the structure and organization of the Enterprise as contained in working paper 16, but would also contain the annotations which were made to that working paper. That paper was issued as document LOS/PCN/SCN.2/L.8 at the resumed ninth session (1991, New York) but did not become the subject of discussion until the tenth session (1992, Kingston). Following an article-by-article reading of document LOS/PCN/SCN.2/L.8, the Special Commission made some additional annotations to that document. The complete set of annotations to document LOS/PCN/SCN.2/WP.16 are contained in LOS/PCN/SCN.2/L.8/Rev.2, which is reproduced in volume 4.

222. In a statement on document LOS/PCN/SCN.2/L.8 at the tenth session (1992, Kingston), the Group of 6 pointed out that since the Third United Nations Conference on the Law of the Sea many important changes had occurred and that changing circumstances might affect the provisions of the Convention relating to the Enterprise. Consequently, the Group thought it was inappropriate at that moment to annotate provisions of which one did not know whether and under what circumstances they would be applied. 17/

3. Development of policies and feasibility studies in preparation for the early entry into effective operation of the Enterprise

(a) Elaboration of operational options/project formulation

223. From the first consideration of this topic, attention was focused on the initial period, which was described in 1984, in LOS/PCN/SCN.2/WP.2, as beginning "under favourable conditions" in the third year, with the pre-investment stage of operations in the fifth year. At the same time, it was also recognized that there would be a critical period in the six months following entry into force, since it would be then that the financial situation would become clear and when registered pioneer investors would be anticipated to exercise their acquired rights.

224. Also evident from the beginning of its work had been the Special Commission's recognition of the need to give priority attention to joint ventures as an operational option of the Enterprise, particularly for its first venture. 18/

225. The first discussions of the Enterprise's operations took place during the third session (1985, Kingston) on the basis of LOS/PCN/SCN.2/WP.6 of 5 February 1985, which had been prepared in response to the Special Commission's request for a complete project profile for the Enterprise, as provided for in article 170 of the Convention. 19/ That working paper, entitled "Project profile of a deep seabed mining operation by the Enterprise", which relied for its data and methodology on pre-existing, readily available studies,

concentrated on evaluating the options available to the Enterprise (i.e., joint ventures, leasing/service contracts, Enterprise as sole operator and mixes thereof according to the phase of work). In the end, these options are to be determined in accordance with financial and manpower requirements.

226. While that working paper was predicated on the underlying assumption of the perceived economic viability of seabed mining, questions were none the less raised as to the basic framework of the profile, particularly as to the parameters listed in its paragraph 20, and their reflection of present and predicted conditions in the minerals industry and markets. 20/

227. To demonstrate some of the issues involved, the delegation of Australia undertook a special study, incorporating more recent data, and submitted it in document LOS/PCN/SCN.2/WP.10 of 14 January 1986, entitled "Economic viability of deep seabed mining of polymetallic nodules" at the fourth session (1986, Kingston). That working paper gave a pessimistic assessment of the economic viability of seabed mining which was attributed to the state of the metal markets. It stated that in the light of the prevailing economic trends, particularly the metal prices for cobalt, copper, manganese and nickel, increases in aggregate metal prices, to as high as twice their levels at March 1985, would be required to make the mining venture viable. It concluded that, given the metal price outlook, deep seabed mining for polymetallic nodules was unlikely to be undertaken on a commercial basis for the foreseeable future.

(b) Chairman's Advisory Group on Assumptions

228. Consequent upon the discussion of LOS/PCN/SCN.2/WP.10, the Special Commission recognized the need to keep the matter of assumptions under review. It therefore created, during the resumed fourth session (1986, New York), an Ad Hoc Group on Assumptions, later to become a permanent feature of the Special Commission's work. The Group was required to report regularly as to whether, in the light of the latest data, a new study updating LOS/PCN/SCN.2/WP.10 could be undertaken by the Government of Australia. At the resumed tenth session the Group submitted a comparative study of the Australian and French models and concluded that neither of them yielded the required discounted cash flow rate of return (DCFROR). The recommendations of the Special Commission with regard to continued work on assumptions are contained in the annex to this report.

(c) Initial operations of the Enterprise

229. From its first consideration of this topic, the Special Commission recognized the need to give priority attention to joint ventures as an operational option of the Enterprise, particularly for its first venture (1985, Kingston). The advantages of joint ventures from the viewpoint of practicality and minimization of risks were stressed, as were the advantages for both mining and processing, particularly with regard to transfer of technology and development of manpower. Nevertheless, it was agreed that the first option to be studied in detail was that of the Enterprise as sole operator of a fully integrated project.

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(i) The Enterprise as sole operator

230. The initial working paper utilized by the Special Commission in its consideration of the operational option of the Enterprise as sole operator was LOS/PCN/SCN.2/WP.2, "The Enterprise, start-up requirements and preparatory measures". Consequent upon the discussions of LOS/PCN/SCN.2/WP.6 and its addendum 1 and corrigendum 1, and LOS/PCN/SCN.2/WP.10 and its addendum 1, the Special Commission decided that any concrete recommendation it drew on operational matters would need to be revised as and when economic prospects for mining improved. As a result, consideration of the Enterprise as sole operator in its initial operations was deferred. 21/

(ii) The Enterprise in a joint venture

231. Throughout its deliberations on operational options, preference was expressed by the Special Commission for the joint venture as the appropriate contractual device to ensure that the seabed was efficiently exploited. In this regard, a number of working papers were considered by the Special Commission. At the second session (1984, Kingston) a preliminary note on the Enterprise prepared by the secretariat of the Asian-African Legal Consultative Committee (AALCC) was presented to the Special Commission. At the same session, the delegation of Austria presented a proposal to establish a Joint Enterprise for Exploration, Research and Development in Ocean Mining (JEFERAD), contained in document LOS/PCN/SCN.2/L.2 and Add.1.

232. LOS/PCN/SCN.2/WP.3, "Information note on elements of joint ventures", was requested by the Special Commission and considered by it during the resumed second session (1984, Geneva). This working paper outlined considerations relevant to the conclusion of joint venture agreements. LOS/PCN/SCN.2/WP.4, "Proposal on joint venture" - Proposals by the delegations of Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland", was also presented at the resumed second session. This working paper, while recognizing that no hard and fast criteria could be established for a successful joint venture agreement, noted the importance of allowing the Governing Board of the Enterprise sufficient flexibility when negotiating with prospective partners. It discussed some of the key elements for establishing a successful joint venture agreement based on a model agreement contained in document LOS/PCN/SCN.2/WP.5, "A model joint venture agreement for seabed mining", submitted by the delegation of the Federal Republic of Germany.

233. LOS/PCN/SCN.2/WP.5 contained a model agreement for establishing a joint venture between the Enterprise and national or transnational, private or State-owned companies or consortia. The model agreement was not meant to tie discussions down to the specific clauses contained therein, but rather to identify the issues that would have to be addressed and equitably solved if a mutually beneficial joint venture relationship was to be concluded between the concerned parties. At the request of the Special Commission, during the fifth session (1987, Kingston), the delegation of Colombia submitted document LOS/PCN/SCN.2/WP.14, "The international venture". This study provided a further analysis of a joint venture between pioneer investors and the Enterprise,

placing special emphasis on exploration, research and development, and the training of personnel.

234. At the resumed eighth session (1990, New York), the Special Commission began consideration of document LOS/PCN/SCN.2/WP.18, "Draft basic joint venture contract: explanatory memorandum", and document LOS/PCN/SCN.2/WP.18/Add.1, "Draft basic joint venture contract", which were prepared by the Secretariat to facilitate concrete discussions on joint ventures.

235. In introducing the working papers, the Special Representative of the Secretary-General for the Law of the Sea recalled that during the meetings of the Seabed Committee and the Third Conference on the Law of the Sea considerable importance had been given to the idea of a joint venture as the sole mechanism for the development of the resources of the seabed. He noted that in response to the request by the Special Commission, the Secretariat had assembled information on joint ventures in the petroleum, mining and other industries to produce the single model contained in LOS/PCN/SCN.2/WP.18. He pointed out that the model did not contain all the details which were needed for a joint venture arrangement.

236. During the discussions of the model contract contained in LOS/PCN/SCN.2/WP.18, questions were raised as to why the incorporated joint venture model had been selected in preference to the contractual joint venture. It was pointed out that the model contract for an incorporated joint venture could be readily adapted to a contractual joint venture by including the standard provisions which formed part of the rules governing incorporated companies in national laws. It was also pointed out that those provisions had not been reproduced for the working paper because they would only have added bulk to the model without adding much to the principles of joint venture arrangements which was the objective of the discussions by the Special Commission.

237. It was noted that most joint ventures dealt with research and development, which went hand in hand with exploration and the development of human resources. It was pointed out that the provisions of LOS/PCN/SCN.2/WP.18 focused on the assets of the joint venture without paying particular attention to the issue of intellectual property and the ownership of patents which were involved in the transfer of technology and the joint development of technology. It was noted that in order for the Enterprise to be competitive, provisions must be introduced in the model to take these factors into account.

238. It was agreed by the Special Commission that the joint venture option was the option to be utilized by the Enterprise in its initial operation but that it should be left to the Enterprise to determine the option to select for its operations when it became a fully fledged operation.

239. Annotations to the clauses of the model joint venture and its explanatory memorandum contained in documents LOS/PCN/SCN.2/WP.18 and Add.1 are presented in document LOS/PCN/SCN.2/WP.18/Rev.2 which is reproduced in volume 4.

240. In a general statement on the subject of joint ventures at the tenth session (1992, Kingston), the Group of technologically advanced States reaffirmed its general acceptance of the joint venture option as the preferred option for the Enterprise in its initial operations, noting the advantages this option offered and the fact that it might contribute to solving problems raised by some of the provisions of the Convention and its annexes. The Group, pointing out that the provisions of joint venture agreements depended on the particular characteristics of the project and the objectives of each of the participants, held the view that it was premature to decide on any clauses of a future joint venture agreement at that stage.

4. Formulation of recommendations on the initial operations and administration of the Enterprise (transitional arrangements)

241. In the discussions on a nucleus Enterprise it was pointed out that when Part XI of the United Nations Convention on the Law of the Sea was negotiated, the pre-operational period had not been foreseen and as a result no institutional arrangement had been provided for it. It was generally agreed that in the interests of economy, the pre-operational period could be broken down into an early or initial stage and subsequent stages as economic circumstances dictated. It was also agreed that the structure of the institutional arrangement during this period should evolve in the same way.

242. On the basis of this discussion the Chairman put forward suggestions on transitional arrangements for the Enterprise (LOS/PCN/SCN.2/1990/CRP.5) in order to facilitate further discussion on this subject at the eighth session (1990, Kingston).

243. The Special Commission undertook a paragraph-by-paragraph reading of this document with a view to reaching agreement on, inter alia, the purpose of transitional arrangements, the functions to be performed under transitional arrangements, the status and structure of the institutional arrangements and rules applicable to the transitional arrangements. In so doing, the Special Commission agreed that form must follow function.

244. The Special Commission agreed on the functions to be performed under the transitional arrangements as contained in section II of document LOS/PCN/SCN.2/1990/CRP.5 and as amended by the suggestions contained in document LOS/PCN/SCN.2/1991/CRP.5/Add.1. In addition it agreed to delete in the first line of paragraph 4 of section II of document LOS/PCN/SCN.2/1990/CRP.5 the words "in the same period".

245. It was not possible to reach agreement on the status and structure of the institutional arrangement of the early or initial stage of the pre-operational period. The view was expressed that there was no need to establish the Enterprise at the early stage of the pre-operational period and there was a stated preference for an arrangement whereby the Governing Board of the Enterprise was substituted for by the Assembly and the Council and the Director-General by an interim coordinator but that when commercial operations became feasible, then the members of the Governing Board and the Director-General could

be elected. The view was further expressed that the interim coordinator would be assisted by experts who would be part of the secretariat of the Authority, and together they would perform the functions agreed upon by the Special Commission as being necessary during the early or initial stage of the pre-operational period and such other functions as entrusted to them by the Council. The number of experts could be increased by decisions of the competent organs of the Authority in accordance with the volume of work. The remuneration of the interim coordinator and experts would be paid out of the administrative budget of the Authority. On the basis of developments in the seabed mining sector, the Council and the Assembly would decide when to set up the Enterprise and to elect the Governing Board and the Director-General.

246. Another view was for the establishment of the Enterprise during the early or initial stage of the pre-operational period. There would be a small interim Governing Board and an interim Director-General. The policies of this nucleus Enterprise would reflect its autonomy and the state of affairs with respect to the prospects for seabed mining. The interim Director-General would be assisted by a small group of experts drawn from the secretariat of the Authority. The interim Director-General and the experts would carry out the functions that had been agreed to in paragraph 1 of part II. The number of experts would be increased according to the volume of work. The remuneration of the interim Director-General and experts would be paid out of the administrative budget of the Authority. The Assembly and Council would decide when to establish the fully fledged Enterprise, enlarge the Governing Board and thus establish the Enterprise according to its constitution.

247. At the end of the tenth session (1992, Kingston), the Special Commission agreed to make the following recommendations to the Assembly:

> "Pursuant to its mandate, Special Commission 2 had devoted considerable effort in grappling with the issue of the status and structure of the institutional arrangements during the pre-operational period. Most recently, this has occurred in CRP.5 and Addenda 1 and 2, which have been debated both formally and informally. What has emerged from these discussions is a widely held view that, in the light of the prolonged delay in the development of deep seabed mining activities, it is unlikely that the Enterprise would be able to undertake operational activities for quite some time. Therefore, in the initial phase what will likely be needed is some initial institutional arrangements which could be activated as circumstances dictate. At the same time, it was recognized that the operations of the Enterprise should be based on sound commercial principles and that it should be autonomous and free from political domination.
>
> "Just as the drafters of the Convention were unable successfully to forecast when commercially viable seabed mining would commence, we should also avoid a similar peril and not, at the present time, attempt to devise concrete operational structures for the Enterprise in the interim period. Let us remember that our task in Special Commission 2 is to provide our best advice, based on all available information, to the Assembly on how to deal with these unforeseen circumstances.

> "The proposal, therefore, is that the Special Commission advise the Assembly to proceed on the basis of the evolutionary approach where the functions of the Enterprise, laid down in the Convention for its efficient operation, are filled and carried out according to the dictates of the prevailing circumstances. We could go as far as to say that the functions enumerated in part II of CRP.5 represent our best judgement on the activities to be undertaken by the Enterprise in this interim period.
>
> "The Assembly will have to judge the best way in which these and any other functions are to be carried out and the functional mechanism and initial status and structure of the Enterprise during the transitional period. Moreover, it should also be kept in mind that there is a general view on the need to minimize the cost to States Parties while at the same time safeguarding both the effective operation of the Enterprise and its ability to evolve in an orderly fashion, as circumstances dictate, into a viable participant in deep seabed mining."

248. The recommendation was agreed to by the Special Commission subject to conditions made by two major interest groups in the Special Commission. The Group of technologically advanced States agreed to the recommendation on the understanding that when the Assembly took its decision, it would be by consensus. The second group, comprising developing States, agreed to the recommendation subject to the condition that the initial structure proposed was understood to be for the pre-operational period only and that when the Assembly decided to enlarge the Enterprise, its decision would be taken in accordance with the modalities set forth in the Convention.

249. Annotations made in Special Commission 2 on the suggestions of the Chairman of the Special Commission to facilitate discussions on transitional arrangements for the Enterprise contained in documents LOS/PCN/SCN.2/1990/CRP.5 and LOS/PCN/SCN.2/1991/CRP.5/Add.1 are presented in document LOS/PCN/SCN.2/1992/CRP.5/Rev.2 which is reproduced in volume 4.

Annex

RECOMMENDATIONS REGARDING CONTINUED WORK ON ASSUMPTIONS

Draft final report of the Chairman's Advisory Group on Assumptions

1. The Chairman's Advisory Group on Assumptions was established by Special Commission 2 in August 1986. The initial Group was formed by the delegations of Australia, Brazil, China, India, Kenya, Uganda, the Union of Soviet Socialist Republics, and of the European Economic Community (EEC). Later, the Group was expanded with the addition of experts from the delegations of Cuba, Madagascar, Zambia, the German Democratic Republic, Cameroon, Canada, Colombia, Thailand and the Republic of Korea (listed in the order of joining the Group).

2. The mandate of the Group was to monitor the economic conditions for deep seabed mining in order to be able to advise the Special Commission on when it might be possible to revise the current model of seabed mining, contained in the Australian study LOS/PCN/SCN.2/WP.10 and Add.1. The study examined the potential viability of a fully integrated independent Enterprise operation with a mining capacity of 3 million dry tonnes of polymetallic nodules per year, by comparing it with the same scale of operation of a hypothetical Australian company. The general conclusion of the study was that at the current metal prices, the mining of polymetallic nodules for cobalt, copper, nickel and manganese from the deep seabed was not a viable proposition, either for an Australian company or for the Enterprise. It was stated that to make a mining venture viable it would require the aggregate metal prices to double at their current level. The technology of mining nodules from the deep seabed had not yet been proved. For that reason, the venture had to be considered high-risk and, therefore, a high discounted cash flow rate of return (18 per cent or greater) would be necessary in order to attract investment capital.

3. The Group was also asked, inter alia, to explore the possibility of introducing into the model new assumptions regarding size of production, number of metals extracted, processing sector and capital and operational costs, without prejudice to the most basic assumption of all, that the Enterprise would not mine until it was economically feasible for it to do so.

4. Since market and price factors were expected to play a key role in establishing the economic viability of deep seabed mining, the Group initially decided that it would examine mainly new developments in metal markets and current movements of metal prices in respect of nickel, copper, cobalt and manganese, and review the short-, medium- and long-term forecasts for the production, consumption and prices of the four metals.

5. The Group relied for that work primarily on the relevant information and statistics supplied to it by the experts themselves (principally by the representatives of Australia and EEC) and the Secretariat. The main source of information on the market prices and forecasts for nickel and copper, which was chosen by the Group as a reliable one, were the World Bank's reviews and reports. The Group also had at its disposal useful United Nations documents, in

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particular, biennial reports of the Secretary-General on trends and salient issues in mineral resources, and some other documents and reports from different sources. Furthermore, the Group had an important meeting with the World Bank representative, who explained their approach to forecasting and answered numerous questions concerning the Group.

6. On the basis of the information available to it, the Group reported to the Special Commission at each session the results of its considerations regarding the current situation with seabed metal markets and prices and their forecasts, which could be found in the reports of the Special Commission to the Plenary.

7. During its meetings in March 1988, the Group decided to start collecting data and information on the current status and development of seabed mining technology. In this connection, the Group expressed its appreciation of a paper by the Secretariat entitled "Current status of deep seabed exploration and mining by technology" (LOS/PCN/L.56), which contributed greatly to consideration by the Group of the feasibility of seabed mining.

8. In 1988 the Australian Bureau of Mineral Resources (BMR) submitted updated price statistics for the deep seabed mining model used for LOS/PCN/SCN.2/WP.10. BMR again came to the same conclusion that given the present and projected metal price outlook, deep seabed mining for polymetallic nodules was unlikely to be undertaken on a commercial, economically viable basis in the foreseeable future. Sustained major increases in real prices of any of seabed metals over the next decade appeared highly unlikely. The economics of seabed mining, therefore, would probably need to be improved by means of cost reductions achieved through advances in marine mining technology.

9. At the resumed sixth session (August 1988), the Group concluded that it had accumulated substantial knowledge of metal market behaviour and future market trends and would only continue monitoring further movements in that essential area for seabed mining viability.

10. Therefore, at the following session, in March 1989, the Group did not focus exclusively on metal prices and forecasts and their implications for seabed mining viability, but turned to the question of preparing a new list of assumptions that could be agreed to by the Special Commission and would, then, justify revision of the current model contained in the Australian study. In that connection, the expert from Australia confirmed that his country would be prepared to revise its study contained in LOS/PCN/SCN.2/WP.10 for the Preparatory Commission as and when Special Commission 2 agreed on a new set of assumptions formulated by the Group.

11. There was general agreement that the United States Bureau of Mines mine simulation (MINSIM) programme used in that study seemed to be satisfactory so that the model itself did not need to be changed in that respect. Under that understanding and in keeping with its main assumption that seabed mining would prove to be viable when metal prices improved and/or when capital and operating costs could be reduced with the introduction of highly efficient technologies, the Group then decided to examine all the economic and technical factors and parameters which were relevant to seabed mining viability.

12. Examining thoroughly the set of assumptions used in the Australian study, the Group questioned whether another set of assumptions would produce a different result in the rate of return. In attempting to prepare a new list of assumptions for revision of the current model, the Group scrutinized the various factors affecting capital costs, including, inter alia, particularly size of the project production and types of processing technologies in terms of whether three of four metals could be recovered and at what rate, with particular attention to manganese. The factors which affected operating costs were studied as well.

13. Accordingly, a paper entitled "Manganese nodule industrial venture would be profitable: Summary of a four-year study in France" attracted a great deal of attention of the Group. That paper was submitted at the 21st Annual Offshore Technology Conference (OTC), held in May 1989. The OTC paper summarized the results of a four-year programme devoted to the technical and economic study of a nodule exploitation project, undertaken by GEMONOD, a French public interest group, including scientists and engineers from IFREMER (Institut français de recherche pour l'exploitation de la mer), C.E.A. (Commissariat à l'Energie Atomique) and Technicatome. The detailed description of the contents of that paper, made by the Group, could be found in LOS/PCN/L.80.

14. Although the new paper did not present enough details to permit a thorough comparison with the Australian study, the Group believed that it contained many interesting and important features. Firstly, the paper concluded that a French project with an annual production capacity of 1.5 million tonnes would be more profitable. Secondly, it was noted that whereas the add-on manganese plant in the Australian study had a negative effect on the profitability of the whole project, in the French study, manganese contributed substantially to the project's profitability. In addition, the French study obtained slightly higher prices for the metals mined and processed.

15. Recognizing that fuller details of the French study were needed for substantive comparison with respect to the Australian study, the Group decided to contact the GEMONOD Group in order to obtain further details and asked an expert from Australia to prepare a preliminary comparison of some basic assumptions of both studies. As a result, at the ninth session, in August 1991, the Group had before it a paper submitted by the delegation of Australia which compared some of the main parameters of the Australian study with those extracted from the comparative study done by French experts of IFREMER under contract to the Commission of the European Communities, which was prepared on the basis of the above-mentioned French study. For the purpose of a more accurate comparison, both sets of figures related to discounted cash flow rate of return (DCFROR) were derived using the same MINSIM computer programme.

16. After examination of that comparison the Group concluded, inter alia, that a project with an annual production capacity of 1.5 million tonnes of dry nodules might be economically attractive. DCFROR obtained for it was estimated to be about 10 per cent after taxes and payment to the International Seabed Authority. The primary reason for the positive DCFROR was the higher recovery of manganese, using pyrometallurgical processing. The Group noted that in order to arrive at a new set of basic assumptions it was necessary to continue to

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examine new developments related to the technical and economic studies on the viability of deep seabed mining.

17. In discussing the scope and substance of its draft final report in March 1992, the Group was of the opinion that the summary and comparison of the main results of the two studies could be of great importance for the Special Commission and should be added to the report of the Group. At the current session, the delegation of Australia, following consultations with IFREMER and the Commission of the European Communities, has submitted for that purpose a slightly expanded and revised version of the comparison of Australian and French studies on the economic viability of deep seabed mining of polymetallic nodules, which concluded that at the moment neither the French nor the Australian study foresee a means of achieving a DCFROR of over 20 per cent, which would be necessary for a high-risk deep seabed mining operation. However, future developments of the technology could lead to a reduction of this high DCFROR requirement. This comparison has been added to the present report as an integral part of it.

18. In conclusion, the Group was of the view that there was need for continuity in its work, suggesting that its successors, during the period before the entry into force of the Convention, should concentrate, inter alia, on periodic analysis of world markets and metal prices, their trends and forecasts; collection of information on and evaluation of technological developments; and assessment of the state of knowledge of deep sea environments and possible impacts of mining activities. In this connection the Group believed that the Secretariat could take up these activities for the time being.

19. The Australian delegation advised that an updated version of its study on the economic viability of deep seabed mining (LOS/PCN/SCN.2/WP.10) incorporating escalated dollar values would be available before the end of the year.

20. The Group placed on record its appreciation to the experts from Australia and the European Economic Community and to the Secretary of the Group for their substantial input to its work.

Notes

3/ LOS/PCN/L.5 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", 11 April 1984 (second session).

4/ LOS/PCN/SCN.2/WP.1 - "Special Commission for the Enterprise - Mandate and programme of work", 27 February 1984 (second session).

5/ LOS/PCN/SCN.2/WP.2 - "The Enterprise - Start-up requirements and preparatory measures", 17 July 1984 (resumed second session). This document, in particular, set forth the full range of considerations.

6/ LOS/PCN/27 - "Suggestions by the Chairman adopted at the 5th Plenary Meeting of the Commission", 8 September 1983 (first session).

7/ LOS/PCN/L.40 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", 4 September 1986 (fourth session).

8/ Ibid.

9/ LOS/PCN/L.45 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", para. 5, 14 April 1986 (fourth session).

10/ LOS/PCN/L.65 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", 1 September 1988 (resumed sixth session) and LOS/PCN/L.70 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", 22 March 1989 (seventh session).

11/ LOS/PCN/L.92 - "Statement by the Chairman of the Preparatory Commission", 21 March 1991 (ninth session).

12/ LOS/PCN/BUR/R.15 - "Report of the second meeting of the Training Panel to the General Committee of the Preparatory Committee", 11 March 1992 (tenth session).

13/ LOS/PCN/BUR/R.29 - "Report of the fourth meeting of the Training Panel to the General Committee of the Preparatory Committee", 29 March 1993 (eleventh session). LOS/PCN/TP/1993/CRP.16 - "Report on the implementation of the French Training Programme" submitted by the delegation of France, 23 March 1993 (eleventh session).

14/ LOS/PCN/L.5, para. 3, See note 3.

15/ LOS/PCN/L.40. See note 7.

16/ LOS/PCN/L.65. See note 10.

17/ LOS/PCN/L.100 - "Statement to the Plenary by the Acting Chairman of Special Commission 2 on the progress of work in that Commission", para. 4, 11 March 1992 (tenth session).

18/ In its consideration of this operational option for the Enterprise, the Special Commission reviewed a number of documents. These were:

(a) LOS/PCN/SCN.2/L.2/Rev.1 and 2 of 10 August 1984 and 21 August 1985, Revised proposal by the delegation of Austria for a "Joint Enterprise for Exploration, Research and Development in Ocean Mining (JEFERAD)", introduced at the second informal meeting during the second session;

(b) LOS/PCN/SCN.2/WP.3 - "Information note on elements of joint ventures", Working paper by the Secretariat, 21 August 1984 (resumed second session);

(c) LOS/PCN/SCN.2/WP.4 - "Proposal on joint venture", submitted by the delegations of Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland, 27 August 1984 (resumed second session);

(d) LOS/PCN/SCN.2/WP.5 - A model joint venture agreement for seabed mining", submitted by the Federal Republic of Germany, 15 October 1984 (resumed second session);

(e) LOS/PCN/SCN.2/WP.18 - "Draft basic joint venture contract: explanatory memorandum", Working paper by the Secretariat, 9 August 1990 (resumed eighth session);

(f) LOS/PCN/SCN.2/WP.18/Add.1 - "Draft basic joint venture contract", Working paper by the Secretariat, 10 August 1990 (resumed eighth session).

19/ LOS/PCN/L.10 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", para. 14, 4 September 1984 (resumed second session).

20/ LOS/PCN/L.20 - "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", paras. 12-14, 2 April 1985 (third session).

21/ LOS/PCN/L.40. See note 7.

PART TWO

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

The mandate of Special Commission 2 is to carry out the functions referred to in paragraph 12 of resolution II and to take all measures necessary for the early entry into effective operation of the Enterprise. This is a difficult and complex mandate and the work of the Special Commission at this session has been largely devoted to a consideration of its various elements and implications.

Special Commission 2 commenced its work with the adoption of the Programme of Work presented to it in LOS/PCN/SCN.2/1984/CRP.1, proceeding thereafter to a general exchange of views, using for this purpose, the Statement of the Chairman made at the resumed first session (LOS/PCN/SCN.2/L.1) and the background paper prepared by the Secretariat on the Mandate and Programme of Work of the Special Commission (LOS/PCN/SCN.2/WP.1).

It became clear from that initial exchange that present economic indicators called for a pragmatic approach to planning for the "early entry into effective operation of the Enterprise". Two points in particular were stressed: firstly, that while all operational options should be studied carefully, a joint venture would appear, for the present, to be the most feasible option for the Enterprise's operation; secondly, that the initial Enterprise might best be regarded as a nucleus establishment capable, however, of maturing quickly under favourable operating conditions.

The main elements in that initial exchange were synthesized in a Note by the Chairman (LOS/PCN/SCN.2/L.3), but that Note cannot now be regarded as an adequate record of all the issues that were raised at this session, since the Special Commission went on in subsequent meetings to further explore the facets of its mandate, particularly as they relate to the application of

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paragraph 12 of resolution II. The Preliminary Note on the Enterprise prepared by the Secretariat of the Asian-African Legal Consultative Committee and presented at the fifth meeting has been an important stimulant in this regard, as has been the proposal of the delegation of Austria to establish a Joint Enterprise for Exploration, Research and Development in Ocean Mining (JEFERAD) (LOS/PCN/SCN.2/L.2 and Add.1).

Significant issues were raised, concerning measures to be taken in the post-registration period, that will call for close study at the next session. For example, it will be important:

(i) To develop, from the beginning, a close co-operative relationship with the registered pioneer investors,

(ii) To be able to judge when a sufficient level of pioneer activity has been reached that will warrant bringing paragraph 12 into operation,

(iii) To ensure under paragraph 6 of resolution I, that the Preparatory Commission has such legal capacity as will be necessary to undertake measures contemplated under paragraph 12

(iv) To provide for the delegation of the functions involved to an appropriate mechanism,

(v) To clarify the scope of the exploration that would be requested of registered pioneer investors

(vi) To establish what the most suitable type of arrangement will be for such exploration. If undertaken under a service contract for example, a draft set of contractual and accounting rules would have to be considered. Such a set will be submitted to the next session by the delegation of Brazil, and the Special Commission is indeed grateful for this "voluntary contribution". The question of the negotiation, approval and management of such arrangements has also to be addressed, as well as possible financial questions that may arise,

(vii) To develop, at an early stage, the objectives and the mechanism for fulfilling the obligation of the registered pioneer to train personnel designated by the Commission. The training arrangements are regarded as an essential component in the preparatory process.

At its seventh and final meeting for this session, the Special Commission took up the question of priorities and its work at the next session.

The main elements of its mandate - operational and organizational planning and interim measures under resolution II are, to a large extent,

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interrelated matters. Since it is not feasible, however, to proceed on all fronts at once, the Special Commission has decided to impose an order on its Programme of Work which would give first priority to its consideration of the application of paragraph 12 of resolution II, followed by organizational and operational aspects (i.e., Items 2, 3 and 1 on the Programme of Work, in that order). Item 4 in the Programme was recognized as mostly being a distillation of the conclusions that would be reached in the course of work on Items 1, 2 and 3. As concerns Item 5, it was understood that the need for co-ordination with other bodies would be addressed as and when necessary and that requirements of an information programme on sea-bed resource development, as indicated in Item 5(b), would be identified in the course of future work.

For the next session the subjects to be addressed are:

Firstly, an examination of the issues involved in the implementation of paragraph 12 of resolution II and consideration of the preparatory measures that could be undertaken in accordance with the provisions of that paragraph;

Secondly, a consideration of the structure of the Enterprise and in particular, the structure and requirements for its start-up establishment,

Thirdly, an examination of operational options, beginning with an evaluation of the joint venture option for the initial operation of the Enterprise.

The Special Commission is therefore requesting that the Secretariat prepare the following working papers for the next session and ciculate them well in advance of the session:

1. An "issue-raising" paper on all aspects of paragraph 12 of resolution II. That paper, for example, should examine in detail the provision on training and the underlying question of the legal capacity of the Preparatory Commission to enter into the various types of arrangements that may be contemplated under paragraph 12;

2. An information note on joint ventures which would also include the main developments in recent joint ventures.

3. A note containing an outline of a start-up establishment for the Enterprise.

These requests of the Secretariat for the next session were formulated in the context of long-term needs for detailed studies on the questions and issues involved in paragraph 12, on a Charter for the Enterprise, and on a model joint venture, with emphasis on methods of financing, management and

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control of operations. In this regard, the Special Commission also sought to encourage the preparation of specialized papers and case studies of relevant national experiences by delegations and to facilitate the participation of national experts in its meetings. The Special Commission saw certain advantages in compressing its meetings into a shorter period rather than spreading them over four weeks, as long as the General Committee could resolve overlapping and other problems, in order to alleviate the difficulties of small delegations and to encourage participation by national experts. It did not, however, reach a conclusion on this matter.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. At the end of the second session, Special Commission 2 decided, as reported in the Statement of the Chairman to the Plenary (LOS/PCN/L.5), to give priority attention, firstly, to an examination of the issues involved in the implementation of paragraph 12 of resolution II and consideration of the preparatory measures that could be undertaken in accordance with the provisions of that paragraph; secondly, to a consideration of the structure of the Enterprise and in particular, the structure and requirements for its start-up establishment; and thirdly, to an examination of operational options, beginning with an evaluation of the joint venture option for the initial operation of the Enterprise.

2. The documents of Special Commission 2 relating to the items under consideration are as follows:

- LOS/PCN/SCN.2/WP.2, entitled "Enterprise start-up requirements and preparatory measures", prepared by the Secretariat and introduced at its 1st informal meeting;

- LOS/PCN/SCN.2/L.2/Rev.1, the revised proposal by the delegation of Austria for a "Joint enterprise for exploration, research and development in ocean mining (JEFERAD)", introduced at the 2nd informal meeting;

- LOS/PCN/SCN.2/1984/CRP.2, containing "Contractual rules that may be applicable to the implementation of paragraph 12 (a) (i) of resolution II on exploration", prepared by experts from the delegation of Brazil, and introduced at the 2nd informal meeting;

- LOS/PCN/SCN.2/WP.3, containing an "Information note on elements of joint ventures", prepared by the Secretariat and introduced at its 7th informal meeting;

- LOS/PCN/SCN.2/WP.4, a "Proposal on a joint venture", made by the delegations of Belgium, France, Federal Republic of Germany, Italy, Japan, the Netherlands and the United Kingdom, and introduced by the delegation of the United Kingdom at the 8th informal meeting.

- The informal paper containing "A model joint venture agreement for sea-bed mining", introduced and circulated by the delegation of the Federal Republic of Germany, will become a document of the Special Commission for the next session.

3. The Special Commission has again had the benefit of the interest and co-operation of the Asian-African Legal Consultative Committee. Its "Memorandum on the Austrian proposal before the Preparatory Commission for the International Sea-Bed Authority" addresses broad issues of concern to the Special Commission, particularly the legal capacity of the Preparatory Commission to enter into arrangements, contractual or otherwise, for exploration and training.

4. The Special Commission welcomed, for the first time, the representatives of the Intergovernmental Oceanographic Commission (IOC), who drew attention to the programmes of IOC in relevant areas, particularly in the fields of marine scientific research and training. An information document summarizing these IOC programmes will be submitted at the next session.

5. The Special Commission held nine meetings. The first five were devoted to a general discussion of all three items outlined in its work programme. The following three meetings gave a first consideration to the question of the implementation of paragraph 12 of resolution II, while the last meeting addressed questions relating to the work of Special Commission 2 at the next session.

6. I wish to draw the attention of the Plenary to the following developments with respect to the three items currently under consideration in the Special Commission. These developments became evident in the course of the general exchange of views on the three items of the work programme of the Special Commission and in its first examination of paragraph 12 of resolution II.

7. Start-up requirements of the Enterprise. The outline, given in part I, paragraphs 6 to 8 of LOS/PCN/SCN.2/WP.2, of the processes for establishing the Enterprise following entry into force of the Convention was considered a useful basis for examining preparatory work in that connection. However, the subsequent actions required for the commencement of Enterprise functions, as outlined in paragraphs 9 to 13, would necessitate a detailed technical examination in the first instance.

8. The description of the initial staffing requirements of the Enterprise, contained in paragraph 8 of Working Paper 2, would require closer examination, as would the methods suggested in paragraphs 11, 18 and 69 of that paper for developing key managerial and technical personnel and expediting their recruitment by the Enterprise. It was recognized that the Special Commission would need to elaborate a possible structure and organization for the Enterprise, taking into account, at the same time, the extent to which operational modalities would affect organizational matters. The Special Commission continues to emphasize the need to establish the Enterprise with a minimal and flexible arrangement that would enable it to respond to favourable operating circumstances.

9. JEFERAD. Requests have been made of the delegation of Austria to elaborate upon its revised proposal, particularly with respect to its funding aspects and the participation of developing countries. The Austrian delegation has indicated its intention to submit a further document at the next session.

10. Joint ventures. The Special Commission has taken note of the various materials now before it on the subject of joint ventures, and has decided that their examination would be taken up at the next session. Delegations, however, continue to emphasize the need for Special Commission 2 to fully examine all operational options available to the Enterprise under the Convention, including the option provided in its article 170, which calls for the Enterprise to carry out operations in the Area directly, as well as processing, transportation and marketing of the minerals recovered from the Area.

Implementation of paragraph 12 of resolution II

11. The Special Commission has tentatively identified some basic questions that would affect the determination of the precise measures under paragraph 12 that the Commission could take during the interim period, as well as the timing and manner of implementing measures. These may be briefly described as follows:

(a) Should the activities called for under paragraph 12 be considered as matters for co-operative action by the Special Commission, the registered pioneer investors and certifying States? The Special Commission has recognized that it would in any event benefit considerably from the advice and assistance of those most directly associated with the development of sea-bed mining;

(b) Considering that the implementation of paragraph 12 would, to some extent, depend on the pace of economic development relative to the mining sector, what methods can be used to determine the proper time at which to institute the different measures that may be called for? The Special Commission is aware that its ability to implement measures in a timely manner will depend largely on the compilation and analysis of relevant information, the prior preparation of guidelines and the establishment of a planning framework designed to incorporate the measures contemplated;

(c) While it is the objective of the Special Commission to ensure that the Enterprise will have the capabilities necessary to enable it to keep pace with other operators in the Area, are there limits to the legal capacity of the Preparatory Commission itself to adopt concrete measures to that end? The question was posed with particular reference to the JEFERAD proposal, but it has also been raised in respect of the implementation of paragraph 12 (a) (i) of resolution II concerning exploration of reserved areas, and of any other measure that would entail making commitments on behalf of the future Enterprise. Bearing paragraph 6 of resolution I in mind, the Special Commission is at the same time aware that it would first have to determine the necessity of any measure before taking action.

12. In this first examination of paragraph 12, some very preliminary guidelines for the future work of Special Commission 2 have emerged:

Firstly, there is a need to ensure, through consultative procedures, that the Special Commission can have access to the best available advice and assistance on matters affecting its preparations for the Enterprise, and that the recommendations and decisions of the Special Commission under paragraph 12 can command the full support and co-operation of the registered pioneer investors and certifying States. Particular attention would also have to be

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paid to the special role that the reporting responsibility of the certifying State under paragraph 12 (b) (ii) would play in providing the information and advice needed for the formulation of recommendations and actions by the Commission.

Secondly, there is an urgent need to begin as soon as possible with the work necessary to design training projects and select personnel for training, since the development of managerial and technical expertise will require a long lead-time to ensure that this key requirement is met. For this purpose, the Special Commission will need to identify its objectives regarding the specific training requirements for the Enterprise.

Thirdly, there is a need not only to pursue a detailed examination of the different component parts of paragraph 12, but also to examine cases where a co-ordinated approach to aspects of their implementation may be employed to good effect. The relationship drawn between the development of key personnel for the Enterprise, the acquisition of technical capability and an arrangement for exploration of a reserved area may illustrate the need for such an approach.

Programme of work for the third session

13. At its last informal meeting Special Commission 2 agreed on the following programme of work for its next session:

(1) Implementation of paragraph 12. Each of the provisions of that paragraph would be addressed one at a time. The order in which the provisions will be taken is as follows:

(a) Paragraph 12 (a) (ii) on training, under which particular attention will be given to:

(i) an examination of what the Enterprises's requirements will be for trained personnel, both managerial and technical, and what the requirements should be for the selection of personnel for training;

(ii) an examination of the kind of training needed for exploration work and the training that could be provided in the context of an arrangement for exploration;

(b) Paragraph 12 (b) (ii) on the periodic reporting responsibility of certifying States;

(c) Paragraph 12 (a) (i) on exploration, under which particular attention will be given to a consideration of how and on what basis exploration could be requested and carried out;

(d) Paragraphs 12 (b) (i) and 12 (a) (iii) on the responsibilities of certifying States as regards funding of the Enterprise and the undertaking of the registered pioneer investor as regards his obligations on transfer of technology.

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(2) Examination of operational options, including examination of the materials submitted to the Special Commission on joint ventures.

(3) Consideration of structural questions, in particular the structure and requirements for the start-up establishment of the Enterprise.

14. In the light of this programme of work for the next session, the priority needs of Special Commission 2 for studies and background papers from the Secretariat are:

(a) A study of the training needs and requirements for the Enterprise;

(b) A background note on exploration, including a review of available information on the status of present activities in the Area. In this connection the Special Commission has authorized the Secretariat to make enquiries of the potential certifying States and their future pioneer investors regarding the implementation of paragraph 12, through the heads of the delegations concerned. Its enquiries should focus on training matters, including the training related to exploration and also on what the requirements and modalities for exploration of reserved areas might be. The Secretariat should also complement these enquiries with letters to the heads of all delegations with respect to their national experiences in relevant areas. Finally the Secretariat should collect information on training matters from intergovernmental organizations. It was understood that the results of these enquiries could be incorporated within the two basic papers requested or could become the subjects for separate papers;

(c) The Secretariat is also requested to produce a composite paper based on Working Paper 2 concerning the development of an expert team for the Enterprise and for facilitating their recruitment by the Enterprise. That paper should also cover the financial aspects, taking into account the expert services available from existing sources;

(d) In view of the need for the Special Commission to examine thoroughly all operational options available to the Enterprise, the Secretariat is requested to develop, on the basis of information available to it, a complete project profile for the Enterprise as provided for in article 170 of the Convention.

Question of the legal capacity of the Preparatory Commission

15. At the final meeting of Special Commission 2 delegations again expressed their concerns, and their assumptions, as to the competence of the Preparatory Commission to engage in arrangements, contractual or otherwise, in order to fulfil the mandate under paragraph 12 of resolution II. Special Commission 2 agreed that at this stage of its work a legal opinion would not be required on the question of the legal capacity of the Preparatory Commission. This agreement does not however preclude a request at a later date for a legal opinion on specific issues as they may arise in the course of the work of Special Commission 2.

16. Mr. Chairman, the essential part of the mandate of Special Commission 2 is paragraph 12 of resolution II, which contains the obligations and responsibilities of registered pioneer investors and certifying States. Its mandate is closely linked in this interim stage with the obligations of pioneer investors and certifying States. Special Commission 2 can only pursue its mandate in consultations with them. I wish therefore to emphasize that the ability of Special Commission 2 to proceed expeditiously with its work is intimately connected with the ability of the Preparatory Commission itself to assume its full responsibilities under resolution II. Substantial progress in our work will hopefully be possible at the next session when the process of registering pioneer investors can be expected to begin.

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Third session, Kingston, Jamaica
11 March-4 April 1985

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. At the end of the informal meetings in Geneva last year, Special Commission 2 established a programme of work for its third session and requested the Secretariat to prepare various papers, as reported to Plenary in paragraphs 13 and 14 of the Statement of the Chairman (LOS/PCN/L.10). The new Working Papers are: LOS/PCN/SCN.2/WP.6, "Project profile of a deep sea-bed mining operation by the Enterprise"; LOS/PCN/SCN.2/WP.7, "Development of an ad hoc expert core group for the Enterprise to assist the Preparatory Commission"; and LOS/PCN/SCN.2/WP.8, "Training needs and requirements of the Enterprise".

2. In view of the technically complex and interrelated character of these papers, the Commission decided to begin its work with a general examination of all three. The five meetings that were devoted to this general review were supplemented by several colloquia, organized by the Secretariat at the request of the Bureau, to clarify technical questions and to facilitate discussion in the Special Commission itself.

3. The Commission had intended to divide its remaining time equally between its consideration of the items in its programme of work on training and operational options. However, the remaining meetings were entirely taken up by the training issue and by questions raised in respect of the proposed establishment of an ad hoc core group of experts. Time did not allow for a discussion of operational options.

4. The Special Commission has not yet exhausted its examination of these three Working Papers.

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5. Many delegations have confirmed that time would be spent on expert appraisal of the Working Papers in the intervening period in order to hold a more in-depth discussion at the next meeting. Working Paper 6 made a number of key assumptions in order to present a project profile. It is expected that these assumptions will be closely scrutinized so as to clarify the possible pre-conditions for establishing the economic viability of sea-bed mining. In this connection the Plenary may wish to note that the delegation of Australia intends to submit for the next meeting an analytical study which is expected to address questions pertinent to the examination of assumptions. It is the intention of Special Commission 2 at its next meeting to reach a working consensus on the assumptions to be used - working assumptions which could be substantiated to the extent possible by reference to all relevant available literature. The Bureau of Special Commission 2 has again invited delegations to bring to the attention of the Secretariat any materials which have not been taken account of in Working Paper 6.

6. To facilitate the work of the Special Commission, the Secretariat has been requested to prepare as soon as possible an analytical summary of the views expressed so far on the question of assumptions. Delegations have also been invited to submit written comments on Working Paper 6 which would be circulated by the Secretariat for the next meeting. Should the Special Commission succeed in reaching a consensus on assumptions at the next meeting, it would then be possible for the Secretariat to proceed with the preparation of a new basic paper on project development for the fourth session. It would be important to have that paper completed by the end of the year. Such an eventuality is, however, dependent upon the progress made at the next meeting.

7. Similarly, Special Commission 2 has not yet exhausted its examination of Working Paper 7. It will need a detailed discussion on the question of establishing an expert group for facilitating preparatory work before any conclusions can be reached. Several suggestions have been made on the need, in any event, to strengthen the Secretariat's ability to provide expert assistance. On such suggestions also, delegations have requested more time in which to consult their experts on the type of expertise that might be required at the current stage, bearing in mind the kinds of problems experts might be asked to examine.

8. Working Paper 8 will also be taken up again at the next session. Training, it must be emphasized, is a priority issue for Special Commission 2, in view of its specific mandate under resolution II. Given the present circumstances in which Special Commission 2 is working, that is, in the pre-registration phase of the interim period, it is aware of the need to reach some concrete understandings both on the requirements of the Preparatory Commission for designating personnel for training, and on the nature and scope of the training obligations of registered pioneer investors. The Special Commission has thus requested the Secretariat to enter into correspondence with the four Member States of the Commission who are also applicants for pioneer investor status,

as well as with other delegations, who would be able to provide relevant information in view of their experience in planning large-scale mineral development projects. The Secretariat was then requested to prepare a short additional paper on training for our next meeting on the basis of the discussions held at this session and the advice and information provided by interested delegations. That paper could contain an inventory of skills relevant to sea-bed mining operations and, if possible, a corresponding list of institutions and States where training in such skills is available.

9. These discussions of the Special Commission have led to the following modifications in the programme of work established for the third session, as contained in LOS/PCN/L.10:

(1) Operational options

(a) Assumptions;

(b) The options as set forth in Working Paper 6, dealing separately with:

(i) Manpower aspects;

(ii) Financial aspects.

Relevant documentation will be LOS/PCN/SCN.2/WP.6, and also WP.3, WP.4 and WP.5; the analytical summary of assumptions to be prepared by the Secretariat; and any written comments on Working Paper 6 submitted by delegations. The analysis to be submitted by the delegation of Australia would also be taken up under this item.

(2) Implementation of paragraph 12 of Resolution II

(a) Question of an ad hoc core group of experts and related proposals for expert services;

(b) Training;

(c) The obligations concerning exploration, provision of funds and transfer of technology.

The relevant documents are Working Papers 2, 6, 7, and 8 and the supplementary paper on training to be prepared by the Secretariat. Document LOS/PCN/SCN.2/L.2/Rev.1 is also before the Special Commission for consideration.

(3) Structural questions

10. I wish to affirm that Special Commission 2 has been very successful in advancing its work at this session, and that much credit must be given to the Secretariat. Its identification and elaboration, in the new Working Papers,

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of the issues before the Special Commission, including that of establishing working methodologies, have been most helpful.

11. In order to indicate the direction of the work at this stage, I would like to refer to some of the points that have been made at this session.

12. Working Paper 6. In his introduction of this paper, the Special Representative of the Secretary-General for the Law of the Sea stressed that while the analysis contained in Working Paper 6 could serve to illustrate the possible different effects of some options, it could not serve as a basis for even the most preliminary determinations or decisions. Furthermore, analyses of this type, particularly in the present circumstances, are dependent on first making certain key assumptions. However, if any or all of the assumptions made do not materialize, the conclusions would be very different.

13. Much of the discussion therefore focused on the likelihood of the assumptions of Working Paper 6 being realized, and views understandably varied on this point. It was thus affirmed that much more detailed work, involving expert review, would be required in order to reach a working agreement on assumptions and on the cost and revenue figures to be used in future working papers dealing with operational options.

14. Some specific points were made on the assumptions given in paragraph 20 of Working Paper 6, on the sequencing used, which in itself constitutes an assumption, and on the financial calculations of the Paper.

15. Assumptions. On the assumptions, as set forth in paragraph 20 of Working Paper 6, emphasis was placed on the importance of the interrelationships among assumptions (a) and (b) on raw material availability, economical processing and marketing, and the current and projected situation as regards market and price factors, technology development, and the impact that technological improvements in land-based mining would have on the viability of sea-bed mining. With respect to the leasing aspects of assumptions (c) and (d), many have pointed to the need to examine the underlying assumptions, particularly as to the availability of such services and facilities. Questions were raised regarding the leasing of processing facilities: since the most suitable facilities are likely to be those of the pioneer investors, designed to meet their own requirements, could it be assumed that the Enterprise would be able to have access to them, even on a cost and risk sharing basis. The several assumptions which concern marketing invited considerable discussion, since market factors are expected to play a key role in establishing the economic viability of sea-bed mining. It was noted that the Enterprise would be a new entrant in the highly competitive, world metal market for the commodities concerned.

16. Sequencing of activities. Many delegations regarded what they considered to be a rapid sequencing in Working Paper 6 as introducing a further assumption, which has affected the financial and manpower flows which emerged therein.

It was therefore suggested that future studies of the type of Working Paper 6 should use a system of relative rather than absolute dates, so that the sequencing could be expanded or contracted as required. This would avoid the necessity also of having to make assumptions as to the actual date when the economic viability of sea-bed mining in general would be established. Future papers should also clearly describe the requirements for and the implications of "GO", "NO GO" or "DELAY" decisions by the introduction of what has been referred to as "benchmarkers".

17. Cost and revenue figures. It was the understanding of the Special Commission that once assumptions could be agreed on, the figures used to analyse operational options would be suitably adjusted. In that process, a discounted cash flow method should be used to derive the internal rate of return. All figures should be subjected to a "sensitivity analysis" which would entail introducing numerous parameters. The study to be submitted by the delegation of Australia, I have been advised, will deal with this very point.

18. Since particular difficulties were encountered with the numbers used for the purpose of assessing manpower requirements and costs under the different options, further investigation will have to be made in order to improve the information base for such assessments.

19. Operational options. In the course of the general examination of Working Paper 6, it should be noted that a number of delegations expressed their preference for a concentration in the future on the study of the joint venture option. Others were of the opinion that it would be premature to introduce such a focus; rather, all options should continue for the meantime to receive the same attention. Many delegations emphasized throughout these exchanges the fact that it is only the Enterprise that can take final decisions as to the method, scale and timing of its operations, including its first operation. In the case of manpower requirements, it was similarly emphasized that it would be the Governing Board and the Director-General of the Enterprise, who would be responsible for all recruitment, including initial recruitment. This point was emphasized also in the context of the discussion of the proposed *ad hoc* core group of experts.

20. *Ad hoc* core group of experts. This idea, first introduced in Working Paper 2, was further developed in Working Paper 7. Many delegations anticipated that such a core group would be a technical research and planning body, rather than a managerial group.

21. While some delegations anticipated that registered pioneer investors and certifying States would be the initial or primary source of such expertise, others pointed out that land-based mineral producing countries could be expected to produce similarly qualified experts. Emphasis has also been placed on the need to adhere to the principle of equitable geographic distribution in composing any such expert group. On the whole, the establishment of such a group

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is believed to be premature at this point, and, in any event, much more detailed consideration will have to be given to the kind of experts involved and the work expected of them.

22. In the course of these discussions, several proposals were made for strengthening the Secretariat's ability to provide expert assistance in the meantime. Such proposals also will have to be studied in terms of the type of experts that would be most useful in the present circumstances and the kind of questions that might be put to them.

23. Training. Training, for the purpose of ensuring "that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with States and other entities", is a major part of the mandate of Special Commission 2 under paragraph 12 of resolution II. This issue, firmly established as a priority in the present programme of work of the Special Commission, is intimately linked therefore to assessments of operational requirements. This has been one of the reasons for considering Working Papers 6, 7 and 8 as interrelated papers, and for emphasizing the importance for the Secretariat of ensuring that all possible available literature is examined for implications in this area. The view is generally held that the Special Commission will need to concentrate on the basis for designation by the Preparatory Commission of the personnel to undergo training, and the nature and scope of the training obligations of registered pioneer investors. Establishing the basis on which the Preparatory Commission would proceed to designate personnel would require, inter alia, an inventory of the skills required for the planning and carrying out of sea-bed mining activities; establishing the approximate numbers and types or levels of personnel for which training would be envisaged, taking into account also the sequential aspects of project development and operations; and determining the basic qualifications and experience that would be required of each type of trainee. Establishing the nature and scope of the training obligations of registered pioneer investors would require, inter alia, a special examination of the qualitative aspects of training, in order to ensure the most useful results; examination of the questions involved in matching the placement of trainees to the particular circumstances and activities of a registered pioneer investor; and attention to the most efficient and cost-effective method for meeting training needs as identified by the Preparatory Commission. It is expected that the short additional paper on training requested of the Secretariat as a supplement to Working Paper 8 will facilitate discussions on this issue at the next meeting.

24. Mr. Chairman, you will have noted that for many aspects of our work, there is an urgent need for the Special Commission to be able to enter into active and constructive dialogue with those with whom we are so intimately linked by virtue of the provisions of paragraph 12 of resolution II.

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Geneva, 12 August - 4 September 1985

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 proceeded according to the programme of work adopted at its third session as contained in paragraph 9 of LOS/PCN/L.20. It held a total of nine meetings, having lost two of its scheduled eleven meetings to other bodies of the Preparatory Commission. Eight meetings were held on operational options, agenda item (1) of its programme: six on the assumptions to be used in studying operational options under reference in LOS/PCN/SCN.2/WP.6 and Add.1, and two on the options themselves as set forth in that working paper. The final meeting was devoted to the question of training (item (2)(b) of the programme) for which a new working paper had been prepared by the Secretariat (LOS/PCN/SCN.2/WP.9, "Implementation of paragraph 12 of resolution II: Training"). That paper contains also the views of a number of delegations given in response to an enquiry of the Secretariat, made in accordance with the decision of the Special Commission at its last session (paragraphs 9 and 23 of LOS/PCN/L.20 refer).

2. Special Commission 2 has decided to retain the programme of work outlined at the third session, but will proceed in the following manner at the next session, having taken account of the actual time devoted to the various items at the third session and at these last meetings:

(a) Training, item (2)(b). This will be the first subject to be taken up so that the Special Commission can be ready to recommend concrete measures to the Preparatory Commission. Delegations wishing to offer information and advice on the question of training under paragraph 12 of resolution II have been encouraged to submit communications to the Secretariat for circulation as addenda to Working Paper 9;

(b) Assumptions, item (1)(a). The effort to reach an agreed set of assumptions on which to base further study of operational options will be pursued. The "sensitivity analysis" of Working Paper 6 to be submitted by the Australian delegation by the end of the year and delegations' expert reviews thereof, as well as of Working Paper 6 itself, will provide the basic materials for that discussion;

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(c) Operational options, item (1)(b). It is understood that the ability to usefully study options will be largely dependent on conclusions reached on the assumptions required to do so. None the less, the options will be taken up one at a time, beginning with the option of a fully-integrated project carried out independently by the Enterprise, including variants thereon. Delegations have been invited to consider methods for facilitating discussion of operational options.

3. The Special Commission has also decided that in view of the importance of the co-ordination of its work with that of Special Commission 3, a more institutionalized approach is required. Thus the Bureau of Special Commission 2 will seek joint meetings as required with the Bureau of Special Commission 3.

4. The Plenary may wish to note also that at the fourth session, the delegation of Austria will submit a new, revised proposal for a joint enterprise for exploration, research and development in ocean mining (JEFERAD), an "executive summary" of which has already been circulated to delegations as LOS/PCN/SCN.2/L.2/Rev.2. At a special colloquium convened by the Bureau to give that delegation an opportunity to obtain some preliminary reactions, the representative of the Asian-African Legal Consultative Committee (AALCC) indicated that its Secretariat will prepare another paper examining the new proposal. Delegations will recall that the AALCC Secretariat had presented its comments on the earlier proposal to the Special Commission.

5. Certain points have been made at these meetings of Special Commission 2 which will have a bearing on the discussion of the three subjects outlined above at the fourth session.

Training

6. Working Paper 9 will be a useful supplementary paper for discussion, particularly because of the contributions made by a number of delegations, reproduced in Annex II of that document. The Plenary may wish to note that a response from the delegation of Japan has since been received by the Secretariat and that the delegation of Canada has made a statement, as a potential certifying State, in response to the enquiry of the Secretariat. The Secretariat will circulate these as Add.1 to LOS/PCN/SCN.2/WP.9.

7. A number of important points were made in the one brief meeting Special Commission 2 was able to hold on the subject:

(a) The need to elaborate an inventory of the skills involved in all stages of sea-bed mining. The response of the delegation of Australia, including its "possible organization chart", as contained in Annex II of Working Paper 9 has invited particular attention;

(b) The need to adopt a cost-effective approach to training under paragraph 12 of resolution II. Implicit to this question are the many timing factors involved, as briefly referred to in Working Paper 9, paragraph 17, and in previous working papers. Questions have also been posed as to possible different methods of financing a training programme in the interim period;

(c) The need to investigate ways of improving access to information on relevant education and training available under existing bilateral and multilateral programmes.

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It would appear that for the time being, there may be only a limited context for the provision of practical training directly concerning skills required for sea-bed mining, which is a matter of particular concern to Special Commission 2. The question has however been raised as to whether there might not be additional or more immediate training needs that should be addressed, as, for example, those associated with ensuring expertise for the International Sea-Bed Authority itself.

Assumptions

8. On this matter, I would first draw attention to my statement at the last session, LOS/PCN/L.20, particularly paragraphs 12 to 18 dealing with the assumptions, sequencing of activities, and cost and revenue figures of Working Paper 6. It was emphasized that papers like Working Paper 6 cannot serve as a basis for even the most preliminary determinations about Enterprise operations. Moreover, and as I have underlined in paragraph 19 of L.20, only the Enterprise can take decisions as to the method, scale and time of operations, including its first operation.

9. It may be noted that a number of delegations are satisfied that the assumptions used are reasonable for the purpose of Working Paper 6. They ask only whether another set of assumptions would produce a different result in the ranking of options. Indeed, a number of basic assumptions derive from the relevant provisions of the Convention, such as the Enterprise's access to funding and technology. Other delegations on the other hand stressed the importance of adhering as closely to reality as possible when studying operational questions. They emphasize the importance of having a clear understanding of the conditions for and timing of the expected commencement of sea-bed mining operations. Thus the Special Commission has a number of problems to deal with before it can agree on a set of working assumptions for further study of operational options, which it had decided were necessary at the last session.

10. For this meeting we had LOS/PCN/SCN.2/WP.6/Add.1 by the Secretariat which made further calculations, according to a number of selected variants, in order to obtain the gross returns per unit of capital and the internal rates of return for the nine options studied in Working Paper 6. Through the device of a Special Commission 2 colloquium, the Special Commission has had an opportunity to discuss some aspects of the work being undertaken by the delegation of Australia on a "sensitivity analysis" of the project profile of Working Paper 6. This is a complex and costly undertaking and the Special Commission is extremely grateful to the delegation of Australia for its initiative in this matter. The final paper will be made available by the end of the year and can be expected to facilitate the efforts of the Special Commission in reaching an agreement on assumptions.

11. Working Paper 6, at the third session and again at these meetings, has provoked a useful debate on a number of diverse issues of general relevance to the work of Special Commission 2. The concerns of those delegations who doubt the validity of the assumptions used stem from the extent to which the assumptions are at variance with present prospects for sea-bed mining and are reliant on parameters, particularly technological parameters, which have not yet been established for sea-bed mining. They believe it essential for the purposes of future work to use assumptions which better reflect present realities in the minerals industry and markets, taking account at the same time of the possible competition sea-bed mining may face from land-based

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mining. By the same token, it would be necessary to use cost and revenue figures in modelling exercises which reflect prevailing trends and which allow for fluctuations in production costs. Ultimately, however, the relevant data is that which can be projected for the date at which actual commercial production is planned to commence.

12. At the fourth session Special Commission 2 will be addressing the problems of making working hypotheses on such factors as:

(a) Prospects for metal prices and markets in the short- and medium-term;

(b) The Enterprise's access to markets and the costs of its marketing as a new entrant;

(c) Size of a project, particularly in terms of whether 3, 4 or more metals (as by-products) can be mined and marketed, with particular attention to ferromanganese;

(d) Efficiency of a project, particularly as determined by the grade of metals and recovery rates over time;

(e) Location of Enterprise operations in terms of transport and marketing costs, as well as available infrastructure;

(f) Availability of facilities and services for leasing, particularly the availability of a processing plant.

13. In addition, the Special Commission will be required to agree on the cost and revenue figures to be used, with suitable variations thereon. As a separate matter, attention will have to be given to the special financing situation established by the Convention (Annex IV, article 11, paragraph 3 (a) to (h)) for the first project, since that situation can be expected to effect the practicality and viability of certain options.

14. Special Commission 2 will therefore be concentrating on finding a set of assumptions and a methodology which might be said to represent the middle ground as between a reflection of today's reality, and a projection of the many facilitating elements for Enterprise operations which will permit options to be studied in detail.

Operational options

15. On the question of the operational options themselves, and on the manner in which Special Commission 2 will build the information and advice thereon for transmission to the Enterprise to facilitate its decision-making, it has been agreed that the first option that should be studied in detail is that of the Enterprise as sole operator of a fully-integrated project. There may however be varying approaches within that option especially as regards the different stages of operations.

16. At the same time it is to be noted that many delegations continue to believe that a joint venture may be the most likely option for the first project of the Enterprise, from the point of view of practicality and minimization of risks. The advantages of a joint venture for both mining and processing have been stressed particularly as regards transfer of technology and development of manpower. Furthermore, some delegations have suggested that when the Special Commission takes up the question of joint ventures in /...

detail, both equity and contractual joint ventures should be studied. Indeed, a virtual agenda has been suggested for that future discussion: the scope of the joint arrangement; the ratio of capital participation; the decision-making mechanism; the arrangement for transfer of technolgy; training procedures; and conflict resolution.

17. While detailed study of operational options is to a large extent contingent upon the working agreement on the use of common assumptions, the Special Commission will none the less welcome proposals at this stage from delegations as to possible different methods for studying options. It has been mentioned that options can be grouped according to common elements, such as similar levels of initial investment or similar capital expenditure patterns.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
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Fourth session
Kingston, Jamaica
17 March-11 April 1986

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. The Special Commission held a total of nine meetings at this session, almost all of the available time being devoted to the question of training for the future Enterprise (LOS/PCN/SCN.2/WP.9 and Add.1 refer). The only new working paper before the Special Commission at this session was the special study prepared by the delegation of Australia, "Economic viability of deep sea-bed mining of polymetallic nodules" (LOS/PCN/SCN.2/WP.10 and Add.1).

2. Special Commission 2 has decided to retain the programme of work as outlined in LOS/PCN/L.25, paragraph 2, but will take the items in the following order:

(a) Assumptions. The objective of this discussion is to reach an agreed set of assumptions on which to base the comparison of operational options available to the Enterprise. The Working Papers are LOS/PCN/SCN.2/WP.6 and Add.1, as well as LOS/PCN/SCN.2/WP.10 and Add.1. The Special Commission urges delegations to provide such additional input, in the form of information, data and calculations, as time permits in the inter-sessional period;

(b) Operational options. The Special Commission will examine the different modes according to their structural, personnel, financial, legal and other implications. As regards structural questions, it is to be noted that Working Paper 9, Annex II, contains a possible organizational chart and that another suggestion was put forward by the delegation of the Soviet Union at this session. As regards the joint venture option, attention is drawn to existing working papers (LOS/PCN/SCN.2/WP.3, 4 and 5);

(c) Training. Emphasis will be given to the formulation of some basic guidelines for the design of a training programme. The Special Commission expects to receive new proposals from interested groups before or during the next meetings.

Of course, should registration take place in the summer the priorities established by this programme of work will be re-examined, particularly as regards training.

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3. I will now summarize the main features of the discussions on training and assumptions at this session.

Training

4. Working Paper 9 and Addendum 1, and the additional information and suggestions offered at this session, now provide sufficient material for the Special Commission to go on to formulate some of the basic guidelines needed for the establishment of a training programme. This may include the following:

(a) Study of manpower requirements. This requires looking at possible organizational structures for the Enterprise (as given, for example, in Working Paper 9, Annex II) and examining functional responsibilities in terms of the disciplines involved and the levels of skill required in all phases and aspects of sea-bed mining. This also requires reaching some working hypotheses as to the numbers which might be required under different operational modes;

(b) Outline of a programme to develop the required skills in the disciplines involved. The outline would take particular account of the scientific and technical expertise that would not be readily available in the absence of specific arrangements for the provision of specialized training and would thus identify the instances where on-the-job training and other practical training are indispensable. For other areas, the outline would indicate where the established programmes of research and teaching institutions can be utilized;

(c) Establishment of criteria, methods and procedures for the selection and placement of trainees as well as the duration of their training. Specific aspects to be addressed include language skills, age and qualifications of trainees, application of the principle of equitable geographic distribution and desirability of rotating trainees;

(d) Implementation of the training programme. This would call for the establishment of a general method for adjusting the ratio of persons designated to available opportunities for specialized training as well as to the projected demand for their services. In other words, it will be necessary to give definition to the objective of achieving the best training in a cost-effective manner.

5. For every step in this process it will be necessary to have the information, advice and assistance that pioneer investors, both applicants and potential applicants, are in the best position to provide. Delegations from countries with long experience in land-based mining and/or offshore mining will also be able to make significant contributions to the design of a training programme, as has already been demonstrated in the responses made by delegations to the request of the Secretariat and reproduced in Working Paper 9 and Add. 1.

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6. In order to formulate the basic guidelines for the planning and implementation of the programme it is essential that the role and scope of the training obligation of the pioneer investors under resolution II be given practical definition. Special Commission 2 understands that this can only be done fully upon registration. Delays in this respect therefore continue to seriously impede the work of this Special Commission. In the meantime, however, a number of important points have been made which will have a strong bearing on that debate. These may be summarized briefly as follows:

(a) In view of the fact that the obligation of registered pioneer investors would continue into the operational period and that as contractors they would be obliged to provide training programmes in accordance with the Convention, the training activities of pioneers must be seen as a continuum. These training activities should commence with research, development and planning, and have the objective of helping to ensure that the other side of the parallel system can benefit from whatever activities are being carried out in the Area;

(b) Both in respect of the pre-operational and operational periods, the main training to be provided by registered pioneer investors is in highly specialized areas, most of which can only be best carried out on the job. It is here that the link between technology and training can best be drawn, particularly since future sea-bed mining will be a high technology industry. On-the-job training would be essential for acquiring knowledge and expertise in the technological aspects of mine planning and development, since the Enterprise must be able to evaluate technology and absorb new technology as it develops. For this reason it has been suggested that a small group of designated trainees be rotated among pioneer investors, language skills permitting, in order to build the requisite knowledge and develop skills in technology assessment;

(c) Since the timing problems of training will in part be related to the pace at which pioneer investors undertake activities in the interim period, it is understood that one element of the obligation of the pioneer investor is the provision of information and advice on new training opportunities as they arise. Close examination will be given also to assertions that the most practical approach is to tie the timing of training to the proven viability of sea-bed mining. While the Preparatory Commission will seek to avoid training people in highly specialized areas where there are no matching guarantees in the demand for their services, strong doubts have been expressed, for example, as to the likelihood of being able to prepare a highly trained cadre of experts in the much shorter lead-time that might be available under such a policy. The Special Commission has already conceded that it may be wise to establish a working ratio between the numbers and types of people initially designated and the number assessed for future operations, on the assumption that it will build later on that initial number as circumstances warrant;

(d) The main focus of training by pioneer investors will be in scientific and technical areas. Training of managerial level personnel would not have the same priority in the interim period. Indeed the Special Commission is of the view that sufficient numbers of experienced managers exist in the mining and petroleum sectors, in both developed and developing countries. They would only require a relatively short period of exposure and orientation in order to adjust their skills to sea-bed mining. It may therefore be premature to train such people at an early stage. Moreover, it would hardly be cost-effective to do so;

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(e) While paragraph 12 (a) (ii) of resolution II, unlike paragraph 12 (a) (i) is silent in respect of costs, it is accepted that they cannot be totally ignored. What seems to be required is for the Special Commission to strike a proper balance between the rights accorded and the obligationsimposed by resolution II. It is conceded that, as a practical matter, the planning and implementation of an effective programme requires that attention be given to its financial implications as well as to its administrative and logistical aspects.

7. The Preparatory Commission should note that there may be some value in ensuring that the training programme it institutes serves equally the needs of the Enterprise, the Authority itself, and the developing countries in the marine minerals sector. However, the Special Commission has not as yet identified any specific implications for the design of a training programme.

8. The Preparatory Commission should also note that while the most important training is that which the pioneer investors will provide, Special Commission 2 believes also that some useful training can be acquired through existing programmes of competent institutions, particularly since such programme would help prepare people for subsequent, more specialized training by pioneer investors. In such cases it would be all the more important that participants have some expertise in areas relevant to sea-bed mining.

9. The Special Commission has thus welcomed the information provided on the International Ocean Institute (IOI) by the delegation of Malta in connection with its proposal (LOS/PCN/SCN.2/L.4), and will welcome any similar proposals concerning other institutions. Sixteen delegations have co-sponsored a draft resolution (LOS/PCN/SCN.2/L.5) which, inter alia, would request a special colloquium during the summer meetings to review the curriculum and syllabus of IOI programmes. The Special Commission agreed to postpone a decision on the draft resolution but wishes to place on record its appreciation and gratitude to the IOI for its offer of training opportunities. The Special Commission notes its willingness to modify programmes on the basis of the Commission's requirements. It will hold informal consultations during the next meetings to examine the proposal further.

Assumptions

10. Special Commission 2 invites the attention of the Plenary to the study prepared by the delegation of Australia on the economic viability of deep sea-bed mining of polymetallic nodules (LOS/PCN/SCN.2/WP.10 and Add.1). The Special Commission is indebted to the delegation for this thoroughly detailed and comprehensive study. It wishes to express its appreciation for the considerable effort and expenditure involved and for the offer of the delegation to process any different assumptions and figures identified by the Special Commission through the established computer programme.

11. Working Paper 10 examines the potential viability of a fully integrated independent Enterprise operation by comparison with the same scale operation of an hypothetical Australian company. It does not deal with the effects of different operational options on viability. Thus it is to be noted that Working Paper 10 does not have the same objective nor does it cover the same ground as Working Paper 6. The purpose of Working Paper 6 was to compare operational options and

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it was based primarily on a pre-existing model prepared for the State of Hawaii in 1981. Working Paper 10 is none the less of fundamental importance for the Special Commission in its efforts to reach an agreed set of assumptions on which the different operational options available to the Enterprise can be assessed.

12. Following the formal introduction of the new study, several colloquia were organized to give experts from delegations the opportunity to ask questions of the Australian delegation as to methodology, basic assumptions, cost and price parameters, as well as various other technical parameters used in the model.

13. Time did not permit more than a brief preliminary examination in the Special Commission of the various facets of such a study, but some aspects were identified which could provide a focus for further work by experts during the inter-sessional period. These are as follows:

(a) Influences on trends in metal prices;

(b) Factors affecting capital costs, including length of periods allowed for mine planning, development and construction, number and type of vessels used, technology costs, and processing plant costs;

(c) Factors affecting operating costs, e.g. cost of fuel, labour, mining ship and overall mining system efficiency;

(d) Variants in mining conditions according to location, e.g. abundance, grade, topography and collector efficiency;

(e) Variants in the metal recovery rate from various processing technologies with particular attention to manganese recovery.

14. In this preliminary examination of Working Paper 10 particular attention was drawn to the effects of manganese recovery on costs and consequently on revenues. It was noted that the model used a common process for the extraction of three metals, recovering manganese by the use of an add-on process. Several delegations have expressed a particular interest in the possible effects on the model if it were adjusted to a three-metal basis.

15. As acknowledged by the delegation of Australia itself, the conclusions of the study give a pessimistic assessment of the economic viability of sea-bed mining, which is largely attributable to the state of metal markets. It is generally conceded that in the light of the prevailing economic trends the short- and medium-term projections for metal prices may be as the delegation of Australia has rendered them. However, many delegations assert that there is no good reason to assume that metal prices will remain indefinitely at the present low level. For the meantime therefore expert attention can be expected to focus on the other basic parameters of the study.

16. To facilitate examination of the different parameters it has been suggested that all existing studies should be examined, although in order to do so properly it would be necessary to devise a method by which they may be compared. Such an exercise would facilitate finding a common ground on which workable assumptions can be based.

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17. Special Commission 2 has urged all delegations having expertise in such matters to supplement where possible the information and data presently available and to conduct additional research into the various factors which affect the parameters of such studies. Special Commission 2 would be particularly interested in the efforts of pioneer investors in that regard.

18. To facilitate the work involved the Secretariat is asked to establish and maintain a record of the different assumptions that have been made in the different studies with any explanations given as to their sources and justifications and to give its assistance to the process of developing a method by which assumptions can be appropriately compared.

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New York, 11 August-5 September 1986

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held 8 meetings, losing 2 of its scheduled 10 meetings to other bodies of the Preparatory Commission. In accordance with its programme of work outlined in the previous statement of the Chairman to the plenary (LOS/PCN/L.30), the Special Commission again took up the question of what assumptions should be used to study and compare the operational options available to the Enterprise. (Documents LOS/PCN/SNC.2/WP.6 and Add.1 and LOS/PCN/SNC.2/WP.10 and Add.1 provided the basis for these discussions.) Statements were also made on preferred modes of operation, as well as on the continuing priority that the Special Commission attached to training.

2. The Special Commission has been unable to proceed expeditiously with its study of operational options because the presently unfavourable prospects for sea-bed mining do not readily permit agreement on a single set of working parameters. As a result, the work on the financial, manpower and technological requirements of the Enterprise has also been affected. Conscious of the fact that it may have already reached the mid-point in its work, the Special Commission held a meeting to evaluate and assess its work in the light of this situation and to consider such procedural options as would further its work.

3. Certain modifications in the present programme of work have consequently been introduced for the fifth session. Several of these reflect a new understanding of the general scope and content of the recommendations that the Special Commission could most usefully prepare to ensure "early entry into effective operation of the Enterprise" (its mandate under resolution I) and its ability to keep pace with the activities of pioneer investors (its mandate under resolution II). There are three sufficiently distinct sets of recommendations that may be contemplated:

(a) Those that address the first operations of the Enterprise and that would necessarily need to take account of the economic conditions for sea-bed mining;

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(b) Those that deal with basic administrative, management and procedural matters, that would be unaffected by the timing of operations and that would permit the Enterprise to function as a distinct entity, without unnecessary delay;

(c) Those that address the implementation of paragraph 12 of resolution II and that may or may not be organically linked to recommendations on the first operations.

4. The Special Commission recognizes that virtually any concrete recommendation it draws up at this time on operational and related organizational matters may need to be revised as and when economic prospects for mining improve. In future, therefore, it expects to work on the basis of more than one scenario, formulating recommendations according to its analysis of the requirements under each scenario. Such a multiple approach, it is believed, has greater value, not only for the Enterprise but also for States as they prepare to become members of the Authority. Thus, the programme of work specifically includes consideration of a recommendation that would have special significance should delays in the projected start-up of sea-bed mining persist at the time of the establishment of the Enterprise. A "nucleus" Enterprise would be recommended in order to provide for continued pre-feasibility work. That "nucleus", it has been further suggested, might not need to be a distinct entity at the beginning; rather, the Authority could provide the necessary expertise, covering expenses from its budget. In the same vein, delegations have suggested that the Special Commission should restrict the scope of its recommendations on operational options, confining itself, unless conditions change, to those options that would better facilitate the start-up of operations. Particular mention has been made of the joint venture and leasing options in that context.

5. The Special Commission has now decided to turn also to those matters that are internal to the Enterprise and relatively unaffected by economic conditions. A first attempt will be made at the next session to outline the main features of the internal administration and management of the Enterprise, with special attention to its unique and distinct status as a commercial entity operating at the international level.

6. As to the implementation of paragraph 12 of resolution II, much continues to depend on the registration process, although the Special Commission has been ready to proceed with the formulation of a training programme for some time. It devoted almost all of the last session to training and, therefore, did not intend to return immediately to the issue unless circumstances warranted it. At the next session, however, training will be the first item to be taken up. Delegations at the present session have also drawn attention to the need to take up consideration of exploration in a reserved area (resolution II, para. 12 (a) (i)). It will be recalled that some early attention was given to that matter in 1984, at which time questions were raised about the legal capacity of the Preparatory Commission to enter into contractual relations with pioneer investors. Should that question need to be resolved, it would be a matter for the plenary rather than for the Special Commission.

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7. The programme of work adopted by the Special Commission for the fifth session is as follows:

(a) Training:

(i) Establishment of policies and procedures for a training programme;

(ii) Consideration of the question of co-operating institutions.

The Contact Group of the Group of 77 on Special Commission 2 matters will submit its proposals on training at the next session. In the event of registration, proposals are anticipated also from the pioneer investors.

The Secretariat will review existing documentation of the Special Commission relevant to training and extract all elements pertaining to the establishment of procedures for a training programme, elaborating on them where possible.

(b) Structure of the Enterprise:

(i) Consideration of a recommendation establishing an initial "nucleus" Enterprise;

(ii) Consideration of more general structural questions, taking account of the requirements of different operational options.

The Secretariat will re-examine its working paper 7 and other papers as relevant, extracting from them all those elements that would be useful to the discussion of an initial "nucleus" Enterprise.

(c) Policies governing internal administration and management of the Enterprise:

(i) Administrative regulations, including those governing entry into contracts;

(ii) Financial management;

(iii) Personnel policies;

(iv) Policy regarding exploration, research and development.

The Secretariat will review such materials as may be available in order to identify possible precedents that might furnish guidelines for administrative, financial and personnel management within such a commercial entity as the Enterprise. If this proves feasible, the Secretariat will attempt to prepare a paper in time for the next session. Delegations have also been asked to provide the Special Commission and the Secretariat with papers on or derived from appropriate precedents.

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(d) Operational options:

(i) Review of general features of options and combinations thereof;

(ii) Specific features of different options, including joint ventures.

Under this item, the Special Commission will review all operational modes that are theoretically possible, proceeding then to an examination of some selected options, addressing any legal difficulties, for example, that could create unnecessary impediments for the Enterprise.

8. The Special Commission is indebted to the delegation of Colombia for its offer, made at the last meeting of the present session, to prepare a study presenting a model for a joint venture covering all stages of operations. The delegation hopes to have that paper ready to submit in time for the next session.

9. The Special Commission also wishes to express its appreciation to the International Ocean Institute (IOI) for the special interest it has taken in training needs relative to the Enterprise. A colloquium was held at the present session to permit IOI to elicit suggestions for modifications to its six-year-old course in marine mineral resource development. Many delegations saw a need for it to focus more specifically on the exploration, mining and processing of polymetallic nodules, since the broader multidisciplinary course, presently offered by IOI, was of less immediate interest to the Commission. IOI has since informed the Special Commission that the annual 10-week course will incorporate some suggestions made during the present session and that an additional 4-week course will be offered in Kingston to overlap with the next session.

Assumptions

10. The delegation of Australia has reported that, for the present, the assumptions used in its model (LOS/PCN/SCN.2/WP.10) need not be changed: any savings attributable to the recent, dramatic fall in the price of oil would be offset by the further drop in metal prices that have taken place since the study was prepared, and by the generally acknowledged need to increase marketing costs from 1 to 4 per cent of metal value. In any event, the view is generally held that oil prices are not likely to remain indefinitely at the present low level.

11. One of the main constraints frustrating agreement on assumptions is the cyclical nature of metal prices, which remain unpredictable. Current forecasts, however, put particular emphasis on the combined effects of a continuing world-wide trend in the substitution of metals, the greater role that new and less metal-intensive technologies play in economic growth and the slow increase in utilization of metals by developing countries. These factors, it is said, can only point to a persistent weakness in metal markets in the future. The general assumption is that sea-bed mining will prove to be economically viable either when metal prices improve or when operational costs can be reduced with the introduction of highly efficient technologies.

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12. This modified programme of work does not specifically include the item on assumptions (see LOS/PCN/L.30, para. 2). However, this does not mean that the Special Commission has abandoned its search for an agreement on assumptions that would permit comparative study of operational options. Special Commission 2 has a major interest in monitoring the economic conditions for sea-bed mining, both in order to be able to revise projections of sea-bed mining viability and to permit it to formulate concrete recommendations on the first operations of the Enterprise.

13. The Special Commission has adopted an alternative approach to its consideration of assumptions. Experts from the delegations of Australia, Brazil, China, India, Kenya, Uganda and the Union of Soviet Socialist Republics, and of the European Economic Community, co-ordinated by the expert from the Indian delegation, have volunteered to exchange information and ideas in-session, and inter-sessionally by correspondence. Experts from other delegations are encouraged to join their efforts. This group, dubbed the Chairman's Advisory Group on Assumptions, will advise the Chairman as to when it might be advisable to update the research and information contained in the current model.

14. The Group is also called upon to consider when and what better perspectives could be introduced into the model. There may be some further avenues that could be explored at this present, pre-feasibility stage, e.g., the introduction into the model of some possible variants in the size of production, the number of metals extracted, as well as in some of the capital and operating costs. Both at the last session and the present session, delegations have called for special attention to the possibility of making some different assumptions about the processing sector.

15. This continuing search for agreement on assumptions is without prejudice to the most basic assumption of all, which is that the Enterprise will not mine until it is economically feasible for it to do so.

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Fifth Session
Kingston, Jamaica
30 March - 16 April 1987

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held a total of seven meetings at this session. The Commission had before it for its consideration four new working papers: "Main Elements of a Training Programme," (LOS/PCN/SCN.2/WP.11), and "A Nucleus Enterprise," (LOS/PCN/SCN.2/WP.12), both prepared by the Secretariat; "Questions relating to Training of Personnel for the Enterprise in accordance with the United Nations Convention on the Law of the Sea," (LOS/PCN/SCN.2/WP.13), prepared by the Working Group of the Group of 77 on the Enterprise (Bangladesh, Brazil, Cameroon, Jamaica, Kenya, Pakistan, Thailand, Tunisia); "The International Venture," (LOS/PCN/SCN.2/WP.14 and LOS/PCN/SCN.2/WP.14/Add.1), prepared by the delegation of Colombia.

2. The Commission decided to follow its programme of work as outlined in the last statement of the Chairman to the Plenary (LOS/PCN/SCN.2/L.40), and took up the first item: the question of a training programme. Almost the entire session was devoted to this issue with the two new working papers related to training serving as the basis for the discussions.

3. The Special Commission had anticipated that registration of pioneer investors would have taken place at this session (LOS/PCN/L.41/Rev.1) and that in accordance with resolution II paragraph 12 (a) (ii), concrete measures on training would have had to be adopted. Unfortunately, registration has not taken place. It was, however, felt that the delay in registration should not impede the process of formulating a training programme. In keeping with its mandate the Special Commision discussed in some detail the question of training.

4. The following summarizes the main points of the discussions that took place on the item of training as it relates to the design of a training programme:

(i) Timing

(a) While the Special Commission realizes that the training obligation of pioneer investors under resolution II can only be implemented after registration, it is of the view that a programme be formulated early but at this stage a distinction has to be drawn between formulation and implementation. The need for obtaining as detailed information as possible from those already engaged in sea-bed activities is considered to be essential to the work of the Special Commission. It is understood that most of the information relevant to training is in the hands of pioneer investors and that such information would be useful to the Commission in order to determine the basic guidelines for a training programme.

(b) With respect to the question of when training should begin, views were expressed that the start up of training must be linked to the viability of sea-bed mining. It was however strongly argued that in view of the importance of training for the participation of developing countries in all aspects of sea-bed mining, such linkage should not be established and that the earlier training could begin, the better it would be in order to keep pace with sea-bed mining development.

(ii) Types of Training

A second matter of concern to the Special Commission is the type of training to be included in a training programme. The document presented by the Group of 77 stressed the importance of technical and scientific training in a variety of disciplines and although it did not discount managerial training, there was a general feeling that the developing world suffered more from a lack of expertise in science and technology than in management. It is recognized that future sea-bed mining operations will be based on high technologies. The question of obsolescence of current technologies and of personnel trained in them is considered to be a practical problem. It is also recognized that technological development is a dynamic process which builds on previous experience and extended delays in training could result in increasing the technology gap between industrialized and developing countries. Distinctions were also drawn between training in the theoretical basis of appropriate academic subjects and practical applications that result from specific on-the-job training.

(iii) Disciplines

It was understood that the list of academic disciplines in engineering and marine science, proposed in the working paper presented by the Group of 77, was not exhaustive. The Commission heard suggestions to include marine biology, bio-physics, meteorology and marine geo-chemistry as well as many computerized technologies.

The Special Commission is of the view that information on the multi-disciplinary nature of sea-bed mining activities is important and that details should be worked out at a later stage.

(iv) Costs

As paragraph 12 (a)(ii) of resolution II is silent on the question of costs, different views continued to be expressed on this issue. As a practical matter, it is recognized that the financial implications of a training programme as well as its logistical aspects should be given consideration. The view was expressed that training costs under this paragraph should be borne by the registered pioneer investors, particularly since in paragraph 12 (a)(i) the cost of exploration is reimbursable. The other view expressed was that silence could not be interpreted as indicating cost free training.

5. Despite the difference of views on some aspects of training, particularly regarding costs and timing, there seemed to be agreement on the need for training. It is to be noted that the first group of pioneer investors have reaffirmed their willingness to fulfill their training obligation. In order to advance its work in the most expeditious way the Special Commission agreed to set up an Ad Hoc Working Group on Training and to mandate it to formulate principles, policies, procedures and guidelines for a training programme. Conscious of the need to reflect all interests and views it was further agreed that the Group will be composed of the four pioneer investors (USSR, France, Japan and India), Canada, Italy, China, Kenya, Tunisia, Bangladesh, Malta, Colombia, Jamaica, provisionally Denmark, the Council for Namibia and a representative from the International Ocean Institute. This Group will be open-ended with the above-mentioned members serving as a nucleus.

6. The Group held its first meeting in Kingston and selected Tunisia as its coordinator. It may meet inter-sessionally and informally in New York at the United Nations as is necessary and may seek, through the United Nations Secretariat, the advice and assistance of experts and/or institutions. It is understood that establishment of this group will not entail any financial implications for the Preparatory Commission. The first substantive meeting of the Group will take place during the first week of the summer meeting of the Preparatory Commission and the Group will submit a report to the Special Commisison during that session.

7. At its final meeting the delegation of Colombia introduced a document it had prepared, namely, "The International Venture" (LOS/PCN/SCN.2/WP.14 and LOS/PCN/SCN.2/WP.14/Add.1). Owing to lack of time, the Special Commission was unable to discuss this working paper but will take it up again at a convenient time during the summer meeting. The Special Commission expresses its deep appreciation to the government of Colombia for this important contribution to its work.

8. The Special Commission also wishes to express its appreciation to the representative of the International Ocean Institute (IOI) for her statement on training.

9. You will no doubt recall that at the last session, during its consideration of Assumptions, experts from the delegations of Australia, Brazil, China, India, Kenya, Uganda, the Union of Soviet Socialist Republics, and of the European Economic Community, coordinated by the expert from the Indian delegation, formed a group called the Chairman's Advisory Group on Assumptions. In the absence of the expert from India, I have asked the delegation of Kenya to assume the coordination of the Group. It is hoped that the Group will report to the Special Commission at its next meeting on the progress of its work.

10. In summary, I would venture to say that the Special Commission has made good progress in its work. The Special Commission has before it two working papers which it has not yet considered: "A Nucleus Enterprise" (LOS/PCN/SCN.2/WP.12) prepared by the Secretariat and introduced at this session, and the document prepared by the delegation of Colombia. Thus, at our summer session we will continue to follow our programme of work as it is laid down in LOS/PCN/SCN.2/L.40. If, however, the process of registration of pioneer investors is completed, then the Special Commission will revert to the issue of training. In any event, if the Ad Hoc Working Group on Training wishes to report on the progress of its work, the Special Commission will at that time take up the item on training.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

(Corrigendum)

1. Page 1, paragraph 2, line 2

   For LOS/PCN/SCN.2/L.40 read LOS/PCN/L.40

2. Page 4, paragraph 10, line 7

   For LOS/PCN/SCN.2/L.40 read LOS/PCN/L.40

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
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New York, 27 July-21 August 1987

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held 11 meetings, i.e. the 43rd to 53rd meetings. In accordance with the programme of work adopted for the fifth session, as set forth in the statement of the Chairman to the plenary (LOS/PCN/L.40), the Special Commission moved to its item on the structure of the Enterprise, including the question of the establishment of an initial, "nucleus" Enterprise.

2. At the same time, work was pursued on the subjects of training and assumptions through the two advisory groups formed for these purposes: the Ad Hoc Working Group on Training, co-ordinated by Mr. R. Bouabid of the Tunisian delegation; and the Chairman's Advisory Group on Assumptions, co-ordinated by Mr. S. L. Rai of the Indian delegation. The first working group was established at the 1987 Kingston session to formulate principles, policies, guidelines and procedures for a training programme; the second was formed at the 1986 New York session to consider whether and when existing models of sea-bed mining viability could be revised. The Working Group on Training met eight times, using the time that was available from meetings of the Special Commission. The Working Group on Assumptions met several times on a more informal basis to review the work each expert had done on metal prices and forecasts. Both co-ordinators reported to the Special Commission at its 52nd meeting (see below).

Structure of the Enterprise

3. The Special Commision had decided at its 1986 New York session to formulate a recommendation for an initial "nucleus" Enterprise to provide for continued pre-feasibility work should delays in the projected start-up of sea-bed mining still persist at that time (see LOS/PCN/L.40, paragraph 4). The working paper prepared by the Secretariat at the Special Commission's request (LOS/PCN/SCN.2/WP.12) noted the resemblance that the "nucleus" Enterprise would

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bear in terms of functions to an earlier notion of a "core expert group", contained in LOS/PCN/SCN.2/WP.7, and went on to raise questions as to the organizational status, governance and budgeting of a "nucleus" Enterprise following the establishment of the Authority.

4. The description given in WP.12 of the kind of monitoring, evaluation and continued preparatory functions that would need to be performed in the pre-feasibility period was generally accepted. Also accepted was the necessity of keeping personnel and costs to a minimum during that period. However, some differences of degree arose as to the proper status that should be accorded such a "nucleus", pre-operational Enterprise. Some saw no need to create a separate Enterprise staff at that stage, considering that the functions involved could be performed by the staff of the Authority, or even by consultants, and subsumed under its budget. Some were of the view that it should be left entirely to the discretion of the Authority to decide when the Enterprise should be formally established. Others, however, held the view that such an approach would violate the Convention inasmuch as the Enterprise was an organ of the Authority and an "autonomous" body of distinct legal personality representing one side of the parallel system. Since the other side of the system existed with the registration of pioneer investors, there could be no justification following entry into force of the Convention to delay in any way the establishment of the Enterprise and the election of its Governing Board and Director-General and the recruitment of the staff considered necessary. Only a staff fully dedicated to the Enterprise could ensure that there would be a proper accumulation of managerial and technical experience. It was to be noted that under any view there was the intention to keep costs to a minimum. The issue was one of form only, not of function.

5. The Special Commission has noted the relevance of certain aspects of the working paper submitted by the delegation of Colombia (LOS/PCN/SCN.2/WP.14 and Add.1) to questions concerning the functions of the Enterprise in the pre-operational period.

6. The Special Commission has made a practical distinction between three possibly distinct phases: the interim period, the pre-operational period following entry into force of the Convention and, finally, the actual operational stage. At its 52nd meeting, the Contact Group of the Group of 77 pointed to the need to establish a "nucleus group of experts" during the interim period to provide competent technical advice on the implementation of paragraph 12 of resolution II, under the supervision of a specially constituted group of Preparatory Commission members. The Special Commission is advised that a detailed proposal will be elaborated for the next session following consultations with all interested delegations.

Training

7. In view of the projected registration of the first group of pioneer investors, the Special Commission decided, at its last session, to proceed as rapidly as possible with the establishment of a training programme in implementation of paragraph 12 of resolution II. The Ad Hoc Working Group was created to facilitate this task. The Co-ordinator has reported good progress in the Working Group following a slow start caused essentially by the demands of the registration process. The Group has proceeded in the order dictated by its mandate, beginning

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with the principles and policies which will govern the programme. It has succeeeded in resolving the substantive issues involved in the formulation of principles and has taken up the question of policies on which it received a joint paper from the first group of pioneer investors. Useful information and suggestions have also been received from the Intergovernmental Oceanographic Commission, Co-ordinating Committee for Offshore Prospecting/South Pacific (CCOP/SOPAC), an intergovernmental mechanism, and the International Ocean Institute. The Group on Training looks forward to receiving further inputs from these and other organizations and institutions.

8. It will be recalled that from the beginning of its consideration of the implementation of paragraph 12 of resolution II the Special Commission has emphasized the necessity of proceeding on the basis of co-operation between the pioneer investors and the Preparatory Commission. The Co-ordinator has affirmed that this policy has served the Group well, as was intended in its composition.

Assumptions

9. The Co-ordinator reports that the present situation for metal prices and markets is practically the same as when the last study of sea-bed mining viability was undertaken. While metal prices may have shown a marginal improvement, forecasts remain essentially the same, so that there are no grounds as yet to consider revising the current models. Each expert member of the Group has taken a metal and reviewed its price and market situation and the forecasts made, relying primarily on the statistics and studies of the World Bank. Attention was drawn to the biennial report on world mineral trends prepared by the United Nations (E/C.7/1987/8), which was made available to all delegations. The Group has expressed its willingness to continue to keep a watch on trends in the demand for the metals concerned and to review new metal studies as they appear.

Programme of work for the sixth session

10. With the registration of the first group of applicants, the work of the Special Commission enters a new phase. After long delays it will now be possible for the Commission to turn to the most vital aspect of its mandate, implementation of paragraph 12 of resolution II, and to do so in concrete terms. The formulation and establishment of a training programme, therefore, commands first priority. Other matters also requiring priority attention, as a consequence of registration, are exploration for the Enterprise by the pioneer investors as well as their obligations with respect to transfer of technology. Matters concerning the organization and structure of the Enterprise, which also include the operational options of the Enterprise by virtue of the interrelationships involved, will also be taken up at the next session as time permits. The programme of work is, therefore, as follows:

(a) Formulation and establishment of a training programme: For the first two weeks of the sixth session it is agreed that that work will be pursued in the *Ad Hoc* Working Group on Training. Its recommendations will be considered subsequently in the Special Commission.

(b) Structure and organization of the Enterprise: For this item the Special Commission will first take up those matters identified in LOS/PCN/L.40, namely, policies governing internal administration and management of the Enterprise: (1) administrative regulations, including those governing entry into contracts; (2) financial management; (3) personnel policies. The Secretariat is asked to review available materials to identify possible precedents for administrative, financial and personnel management within such a commercial entity as the Enterprise and to prepare a paper for the next session. Delegations are asked to provide the Special Commission and the Secretariat with papers on or derived from appropriate precedents.

(c) Implementation of paragraph 12 of resolution II in respect of exploration and transfer of technology.

11. Since the forthcoming session marks the beginning of the most important stage of work for Special Commission 2, the Preparatory Commission is requested to accord every priority to the Special Commission in the organization of work for the next session. I would urge individual delegations also to come fully prepared to proceed with the formulation and adoption of concrete measures. I would urge further that delegations bring as many experts in the appropriate fields as is possible so that the Special Commission will have the benefit of the best advice available.

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Sixth session
Kingston, Jamaica
14 March-8 April 1988

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THE COMMISSION

1. Special Commission 2 held 12 of its scheduled 14 meetings for the current session. Much of the time involved was allocated to its Ad Hoc Working Group on Training, in accordance with the special priority established for the work of this Group, following upon the registration of the first group of pioneer investors. The Chairman's Advisory Group on Assumptions also met several times during the course of the session. The meetings of Special Commission 2 as a whole were devoted to the item on structure and organization of the Enterprise, for which the secretariat had prepared a working paper (LOS/PCN/SCN.2/WP.15).

2. This report, therefore, covers three subjects: assumptions; training; and structure and organization of the Enterprise. The programme of work for the next session is set forth in paragraph   below.

Assumptions

3. The Chairman's Advisory Group on Assumptions was formed in 1986 to advise on when it might be possible to update the research and information contained in the current model of sea-bed mining feasibility as contained in LOS/PCN/SCN.2/WP.10 and Add.1. The Group is now co-ordinated by Mr. Luis Preval, the expert from the delegation of Cuba, and has been strengthened by the inclusion of experts from the delegations of Madagascar and Zambia. Experts from other delegations have also been encouraged to join the Group.

4. As at previous sessions, the Group reviewed the current situation of the four metals, particularly the recent nickel and copper price increases and their short-term forecasts. The copper price is forecast to average out for 1988 at a fairly high level as compared to previous years, but will probably fall to previous averages by 1989 in view of anticipated supply increases and the slow-down of industrialized economies. The sharp increase in nickel prices has been attributed to various factors, some of them coincidental, and the forecast is for nickel supply conditions to remain tight in the first half of 1988, with a probable continued upward pressure on nickel prices during the year.

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5. The Co-ordinator has reported that the Group is nonetheless of the opinion that while short-term forecasts have shown some improvements for nickel and copper, the longer-term forecasts will remain essentially the same. There would be no need as yet therefore to raise the question of revising the current model of sea-bed mining.

6. The Group, at this session, has concluded that it will be essential for Special Commission 2 to regularly receive data and information on the current status and future projections for supply, demand and price of the four metals, as well as for sea-bed mining technology. In this latter connection, the Group expressed its appreciation of the secretariat paper, "Current status of deep sea-bed exploration and mining technology" (LOS/PCN/L.56). The need for data and information from reliable sources is shared by Special Commission 1 and indeed by the Preparatory Commission as a whole. It is therefore proposed that the secretariat begin to develop a cost-effective data bank which in time would permit periodic reports to be done, for example, biannual reports on the current status of the metals and annual reports on salient developments in the projections for future periods, and in technology relating to sea-bed mining. This may take some time. For the next session, therefore, the secretariat is asked to prepare a short review of current movements of metal prices, based on information gathered from reliable sources, as well as a review of short-term price forecasts, if any are available in the intervening period. Delegations are asked to assist by supplying relevant data and information, including any advice on sources of information. The Group itself will continue to evaluate, in accordance with its mandate, all information and opinion which have a bearing on sea-bed mining feasibility.

Training

7. It will be recalled that the Ad Hoc Working Group on Training was established at the end of the spring session in 1987 in order to advance the work of Special Commission 2 in the most expeditious way. It was mandated to formulate principles, policies, guidelines and procedures for a training programme. The Group began with principles, and at the end of the summer session was able to report that it was successful in resolving the substantive issues involved. However, this was first put into writing only early in the current session. There was only a very limited opportunity at the previous session to consider the question of policies and the paper presented by the four pioneer investors at the request of the Group.

8. It should be noted that the Group resumed its work at the present session in the new context of the registration of the first group of pioneer investors and the consequent need to give definition to their obligations under paragraph 12 (a) of resolution II.

9. The Working Group has been successful in the difficult task of identifying and resolving the major substantive issues involved in the formulation of policies. The Group itself attributes much of this success to the efforts of Mr. Baidy Diene of the delegation of Senegal, who is now Co-ordinator of the Group.

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10. The current status of the work on formulating principles and policies has been outlined for the Special Commission by the Co-ordinator, who emphasized the need to complete consideration of the next section on Guidelines and Procedures before tackling actual drafting questions. At that time also, all formulations would be examined together in order to ensure that the necessary logical connections are made and that the proposed programme outline is coherent.

11. In his report to the Special Commission, the Co-ordinator correctly emphasized the overriding importance of the principles and policies which would affirm the necessity of planning and carrying out the programme as a co-operative exercise between the Preparatory Commission, on the one hand, and the registered pioneer investors, together, as appropriate, with their Certifying States, on the other. The Preparatory Commission will recall that the Bureau of Special Commission 2 has sought since 1984 to institute such a co-operative approach to all aspects of the implementation of resolution II, paragraph 12 (a). This approach, as now reflected in the present formulations of the Working Group, would call for a suitably representative body or mechanism within the Preparatory Commission to oversee the Programme, and consequently for Programme procedures appropriate to this co-operative approach.

12. In view of the substantial progress made in the Working Group, the present draft formulations for principles and policies will be circulated to delegations intersessionally as a conference room paper of Special Commission 2, translated into all languages.

Structure and organization of the Enterprise

13. The Special Commission has again affirmed that the Enterprise, at whatever phase of its development, must be a model organization as regards the competency of its staff, the efficiency of its management, and its ability to respond quickly and effectively to developments in the future sea-bed mining industry. Its operations and final organizational configuration, it was again emphasized, must await decisions which can only be made by the Enterprise itself.

14. The working paper (LOS/PCN/SCN.2/WP.15), prepared by the secretariat at the request of the Commission at the last session (LOS/PCN/L.50, para. 10 (b)), proved to be a good basis for discussion, even though its approach was considered to be very general. The paper was particularly useful in its summary of all earlier discussions relating to the questions involved, since this gave a clearer focus to the approach to the establishment of the initial Enterprise which has come to be known as the Nucleus Enterprise. Here, it should be noted that there continues to be some divergence of views as to whether the very initial organization should be an autonomous entity, with a structure as set forth in the Convention, or be provisionally represented by experts incorporated within the staff of the Authority. Similarly, there are different views on the usefulness of creating an ad hoc group of experts before entry into force of the Convention to facilitate the work of an initial Enterprise. Clearly, these

differences stem from varying perceptions as to what the state of preparedness should be, relative to the projections on sea-bed mining feasibility and the functions that could be usefully performed in the prevailing circumstances.

15. In fact, the Special Commission did not dwell unduly on the uncertainties involved, but concentrated rather on the need to clearly identify the requirements of a nucleus organization that could evolve, in accordance with external circumstances and its own internal policies and procedures, into a fully-fledged organization, capable of operating under any of the various options theoretically available. Working paper 15 had not entered into questions of financial, administrative and personnel procedures in any detail since many would vary substantially according to the operational mode. Moreover, there are no ready precedents for the Enterprise; the lack of any substantive response from delegations on the applicability of policies and procedures within existing comm commercial enterprises, international or national, had obvious effects on the ability of the secretariat to explore such matters in any detail. In this same context, the Special Commission predicts that it will be possible, even during the interim period, to narrow down the likely range of options that the Enterprise would consider. In this event, the work of the Special Commission would be adjusted to take this into account. Special mention was made of joint ventures and of their complexities, which would indicate the need to allow sufficient time to assemble the necessary information and prepare any working papers needed.

16. For the mean time, the Special Commission has agreed to focus in more detail on a Nucleus Enterprise, structured according to the Convention, in order to move towards a concrete recommendation which would include all the necessary elements. The programme of work for the summer session reflects this interim approach. This focus is without prejudice to the possible need in the future for Special Commission 2 to consider the outline of an integrated corporate structure capable of directly conducting all phases of sea-bed mining, and the organizational aspects of other operational modes.

Programme of work for the summer session

17. The programme of work for the sixth session is set forth in document LOS/PCN/L.50. The following modifications have been introduced to take account of the yet greater priority given to the Ad Hoc Working Group on Training.

(i) Training

Time will be given to the Group on Training from the meetings allocated to Special Commission 2, as required throughout the session, in order to pursue its work on Guidelines and Procedures and complete its mandate. In the first part of the session, the Special Commission will itself review the results to date of the Group's work on Principles and Policies, and for this purpose, a conference room paper will be circulated intersessionally in all languages.

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(ii) Structure and organization of the Enterprise

Time will be devoted as available to the continued consideration of this question, with a focus on an elaboration of the powers, functions, and internal procedures of a Nucleus Enterprise. It may be possible for the secretariat, as soon as the next session, to do a paper on some internal procedural aspects of a Nucleus Enterprise, including suggestions on rules required for such matters as confidentiality.

(iii) Implementation of paragraph 12 (a) of resolution II in respect of exploration

A first preliminary exchange has been scheduled on the questions involved in exploration under paragraph 12 (a) (i), with the understanding that this will be followed by a more detailed consideration of the subject at the 1989 spring session. For that subsequent discussion, the secretariat is requested to prepare a paper setting forth the types of activities that might be involved and their purpose. This paper should be circulated well in advance of the spring session in 1989.

Registered pioneer investors and delegations that have experience in deep sea exploration are asked to come to the next session prepared to describe what is actually involved.

18. The Preparatory Commission may wish to note that as concerns paragraph 12 (a) (iii), Special Commission 2 will await a more advanced stage of work in Special Commission 3 on the provisions for transfer of technology in the Mining Code. At such a time, the Chairmen will consult to avoid any duplication of work.

19. The Special Commission is grateful to the delegation of Brazil for the several offers made to assist the work involved in the current programe of work, namely, a revision of the conference room paper 2 prepared by that delegation in 1984, and a short paper on management within a Nucleus Enterprise.

20. The Special Commission has endorsed the proposals made by the Chairman's Advisory Group on Assumptions, as described in paragraph 6 above. Thus, for the summer session the secretariat will submit a short information paper on the current situation and short-term forecasts for metal prices and markets.

21. Mr. Chairman, the ability of Special Commission 2 to reach firm conclusions and go on to make the kind of concrete recommendations that would be of real assistance to the future Enterprise and to States Parties to the Convention, is greatly dependent on the extent of the commitments that registered pioneer investors and their Certifying States make to their obligations under resolution II, paragraph 12. Moreover, it is only with their continuing and close co-operation that the Special Commission can move on with its work.

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New York, 15 August-2 September 1988

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held 10 meetings, with most of the time given over to the *Ad Hoc* Working Group on Training. Time was also allocated to the Chairman's Advisory Group on Assumptions.

2. The programme of work established in LOS/PCN/L.60, paragraph 17, covered training; structure and organization of the Enterprise; and a preliminary exchange on the implementation of paragraph 12 (a) of resolution II in respect of exploration. The Special Commission devoted several meetings to the results of the work of the *Ad Hoc* Working Group on Training on the principles and policies for a Training Programme to be instituted by the Preparatory Commission (LOS/PCN/SCN.2/1988/CRP.3) and to its first discussion of matters relevant to exploration. The subject of the structure and organization of the Enterprise was left to the next session as it had not been possible for the Secretariat to prepare the paper requested on the subject in the limited time available. The present report consequently deals with the progress of work on exploration questions, assumptions and training.

Exploration

3. At the request of the Special Commission, experts attached to the delegations of China, France, Japan and the Soviet Union, and speaking from their personal experience, outlined the progress made on the scientific and technological aspects of deep sea-bed survey and exploration work. They also described the problems they have encountered and their effects on priorities for ongoing research and development activities.

4. Of particular benefit was the opportunity afforded to assess the present state of knowledge as to the fundamental parameters involved in determining which areas would merit the concentrated investigation needed for the subsequent delineation of areas that can be mined. What is needed is enough detailed information to indicate

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a sufficiently favourable combination of nodule composition, nodule density and workable terrain. The experts explained that, while the work on nodule composition and density had been sufficient to determine general areas of interest, work on the last-mentioned parameter was now the focus of attention. The paucity of information on the sea-bed terrain had thus led to a relatively new emphasis on the development of techniques for observing and mapping ocean floor features. Problems were also mentioned relating to improving the efficiency and reliability of collecting devices and lifting systems. The present period was categorized as one in which the most attention was being devoted to improving exploration technology and methods for studying the ocean floor, including the development of new applications such as lasers and fibre optics.

5. Some time was devoted to the difference between surficial nodules, including those lightly covered by sediment, and nodules that are buried. It was observed by various delegations and some of the experts that for the purposes of exploration and exploitation only surficial nodules would be of interest. In view of the fact that buried nodules raised separate technological problems, they were considered not to be economically attractive. It was noted that their recovery would in any event bring to the fore serious environmental problems. The Special Commission was informed that research into the genesis and occurrence of buried nodules would continue since such knowledge would be important in the future.

6. The experts dwelt at some length on the special environmental problems they envisaged with sea-bed mining. It was pointed out that, on land, pollution problems with mining tended to be localized, whereas sea-bed mining had the potential for wide-scale environmental disturbance. In addition, very little was known about the ecology of the deep sea and about the recovery rates of living organisms, which were assumed to be very slow. There was also the problem of pollution from sediment brought to the surface. One expert mentioned that attention would be given to the possibility of returning the sediment to or near the bottom. Members of the Special Commission none the less felt that solutions to such environmental problems would be found only when actual mining had started, as had been the case on land. They did not expect, therefore, that exploitation would be delayed solely for environmental reasons. It was, however, recognized that the Preparatory Commission would have to give special attention to environmental issues.

7. In the process of the present review, various experts pointed out that their current modelling exercises were now based on the assumption of future operations of 1.5 million tons of dry nodules per year. This has been duly noted by the Special Commission in view of the possible implications for its own work on sea-bed mining feasibility questions.

Assumptions

8. The Chairman's Advisory Group on Assumptions held four meetings, including a special meeting with an expert from the the World Bank, Mr. Priovolos, which preceded his presentation to Special Commission 1.

9. The Group mainly considered the new developments in metal markets, and particularly those for nickel and copper; and the short-, medium- and long-term forecasts for metal production, consumption and prices.

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10. The Co-ordinator of the Group, Mr. Luis Preval (Cuba), reported that information and statistical data had been made available by the experts of Australia's Bureau of Mineral Resources, the European Economic Community, the delegation of Uganda, and the group of registered pioneer investors, as well as by the World Bank expert. The data showed that nickel and copper prices fell slightly in the third quarter of 1988 in contrast to the first quarter, and that they were expected to hold at least until the end of the year. The World Bank expert reported, however, that the Bank's short-term forecast was for a decline in both nickel and copper prices in 1989-1990, with a slower rate of decline for copper.

11. The Australian Bureau of Mineral Resources had updated price statistics for the deep sea-bed mining model used for LOS/PCN/SCN.2/WP.10, and again came to the same conclusion about the feasibility of sea-bed mining. Improvements in the economics of deep sea-bed mining will come from higher market prices and also from cost reductions achieved through advances in mining technology.

12. The Group concluded that it had accumulated substantial knowledge of metal market behaviour and future market trends. The members of the Group will study and evaluate, intersessionally, all the reports, information and data obtained at the current session. They will also have, as soon as it is complete, the Secretariat's paper on the current movement of metal prices covering the period from December 1987 to December 1988. The Group will therefore be in a good position to proceed at the next session to a detailed examination and evaluation of all the factors involved.

13. The Special Commission has noted the expansion of the Group, with the addition of experts from the delegations of the German Democratic Republic and Cameroon.

Training

14. At the end of the spring session, the Ad Hoc Working Group on Training had reached substantial agreement on its draft formulations of the principles and policies that should govern the programme. The Special Commission consequently decided to issue the draft principles and policies (LOS/PCN/SCN.2/1988/CRP.3) in order to be able to examine the results of their discussions.

15. Special Commission 2 thus reviewed CRP.3 at the beginning of this session and concluded that there was basic agreement on principles and policies and that the document would provide the basis for the work to be done on guidelines and procedures. In accordance with its mandate, the Group proceeded to examine the question of guidelines and procedures for the implementation of the programme.

16. The Ad Hoc Working Group on Training held six meetings on the basis of a paper prepared by its Co-ordinator, Mr. Baidy Diene (Senegal), at the request of the Group at the end of the last session.

17. In his report to the Special Commission, the Co-ordinator recalled that since guidelines and procedures were subsidiary to and derivative of established principles and policies, his suggestions to the Group were built on the draft contained in document CRP.3. His paper was prepared with the purpose of

facilitating the Group's first consideration of the many elements involved. The Co-ordinator pointed out, however, that it had not been possible in the present circumstances to present a complete list of suggestions since certain questions had not been fully resolved in document CRP.3, particularly as concerns financial responsibility for the training to be provided under the programme.

18. The suggestions of the Co-ordinator related primarily to the establishment of a training panel to plan and carry out the programme, an approach derived from the first principle given in paragraph 1.1 of document CRP.3, namely, that "training must be planned and carried out in close co-operation between the registered pioneer investors and, as appropriate, the Certifying States on the one hand, and the Preparatory Commission on the other", and from the first policy statement, made in paragraph 2.1, that "the Preparatory Commission will designate a representative body to plan and carry out the Programme".

19. The Group discussed inter alia the composition of the panel, its functions and its meetings, and in this context placed strong emphasis on the need for economy and efficiency. As an example, the panel should meet only when the Preparatory Commission meets and its members should be attached to the delegations concerned in order to avoid any inference that there will be additional costs involved. For the same reason, it was thought necessary to specify that the Secretariat would provide administrative and support services in conjunction with its servicing of the Preparatory Commission. There was an inconclusive discussion on the need to specify that the members of the panel should be experts, specialized in appropriate fields, including those specialized in training itself. As to the composition of the panel, it was suggested that it should be representative of the different interests involved, namely, the registered pioneer investors or their Certifying States, the Governments of the potential pioneer investors, the Group of 77, the Friends of the Convention and China. As to its possible size, one suggestion was that it should have 18 members.

20. The functions of the panel, pursuant to paragraph 2.1 of document CRP.3, are understood to cover both the planning and implementation aspects of the programme. One of the first questions discussed, therefore, was whether to allow for an "initial planning period", essentially to deal with the "initial priority" for "surveying and exploration, and assessment of the results thereof", as established in paragraph 2.3 of document CRP.3.

21. It is understood that there should be a register to receive candidatures. Before nominations to the register could be invited, the proposed panel would face considerable work in first identifying the categories of disciplines and skills involved and in establishing the required qualifications and experience at each of the levels envisaged within those categories. The Group recognizes that the co-operation of the registered pioneer investors, given their special experience, will be very important for this work.

22. The Group also discussed the actual phase of identifying the traineeships which would be offered in any given period. This would be done following on the information and proposals submitted by the registered pioneer investors in the context of the pioneer activities planned for that period, pursuant to the policy

established in paragraph 2.4 of document CRP.3. When such a list of traineeships is drawn up, with the necessary details as to the kind of training offered, where, when and for how long, the register would then be consulted to find the most suitable candidates to match the traineeships offered. The candidates selected would then be recommended to the Preparatory Commission for designation under the programme, in accordance with paragraph 2.7 of CRP.3. This process awaits further examination.

23. When discussing the general aspects of the planning processes involved, questions were raised as to the general scope of the advisory functions of the panel. In any event, it was agreed that the recommendations prepared by the panel would need to command the full support of its members.

24. As to the procedures to be followed for the establishment and maintenance of the register and for the submission of nominations by Governments, discussions dealt with such matters as the need for a general guideline on the maximum age of candidates, the need for information from nominating Governments on the general availability of their candidates and the extent to which the register might have to be updated, not only to take account of information on candidates but also to reflect any changes of a programming nature.

25. In the very brief examination of matters concerning selection and placement, it was recognized that the traineeships would primarily be practical in nature and would not in principle be awarded for academic studies leading to degrees or diplomas.

26. The Working Group did not have sufficient time to examine such other suggestions as would concern the general requirements of trainees and administrative matters involving the trainees, the nominating and receiving Governments and registered pioneer investors.

27. The first task for the Group at the next session will be to complete its first consideration of all the many elements involved in guidelines and procedures, before proceeding to drafting.

28. The plenary should note that the Group will not conclude its mandate until it has examined the whole package of principles, policies, guidelines and procedures for the Training Programme, in the interests of ensuring overall harmonization and coherent drafting. Special Commission 2 will then review these results and present a final integrated proposal to the plenary for adoption. It is hoped that this process can be completed at the next session. As I have emphasized in the meetings of Special Commission 2, the realization of this objective could be the most important achievement of the Preparatory Commission at the present stage of its work.

Programme of work for the seventh session

29. Bearing in mind the programme of work set for the sixth session (given in LOS/PCN/L.50 and modifed in LOS/PCN/L.60), and considering also the new papers requested of the Secretariat on two of the items involved, namely, the structure

and organization of the Enterprise and exploration, the programme of work for the next session is as follows:

(i) Structure and organization of the Enterprise

Discussions will focus on what the powers, functions and internal procedures of a nucleus Enterprise should be. For this purpose, it may be necessary to look first at the general framework provided in annex IV to the Convention which contains the statute of the Enterprise. The paper by the Secretariat, requested in paragraph 17 (ii) of LOS/PCN/L.60, will provide useful ideas for this discussion.

(ii) Implementation of paragraph 12 (a) of resolution II in respect of exploration

The first preliminary discussion held at the current session, made possible by the co-operation of experts from registered pioneer investors, will help considerably the detailed discussions which have been scheduled for the next session in accordance with LOS/PCN/L.60. They can also be expected to assist the Secretariat in the preparation of its paper on the various aspects of exploration. Delegations - particularly those of the registered pioneer investors, given their special experience, as well as other delegations - are invited to submit relevant materials to the Secretariat.

(iii) Training

The Ad Hoc Working Group on Training will continue its work in preparing the draft guidelines and procedures required for implementation of the training programme. On completion of that work, it will then proceed to consider the whole integrated proposal from the point of view of internal harmonization and coherent drafting. As time permits, this integrated proposal will be returned to the Special Commission for review and preparation of recommendations to the plenary.

30. The timetable of Special Commission 2 at the next session will therefore reflect the need to allocate a portion of each meeting to the Ad Hoc Working Group on Training. Some time will also be set aside for the Chairman's Advisory Group on Assumptions since it has accumulated a considerable amount of information and data requiring close examination and evaluation.

31. Finally, the plenary should note that matters relating to the development of the training programme, as well as to other elements contained in paragraph 12 of resolution II, are basic to the mandate of the Special Commission, as set forth in resolution I establishing the Preparatory Commission. Consultations and negotiations, conducted under the aegis of the plenary, should therefore take fully into account the work already accomplished in the Special Commission and the work yet to be done.

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SEA-BED AUTHORITY AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
Seventh session
Kingston, 27 February-23 March 1989

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held 11 of its scheduled 13 meetings, most of this time being devoted to its consideration of the structure and organization of the Enterprise and to the drafting of a Training Programme under paragraph 12(a)(ii) of resolution II, in accordance with the programme of work for the seventh session set forth in paragraph 29 of LOS/PCN/L.65. The Ad Hoc Working Group on Training, established by Special Commission 2 in 1987 to prepare draft principles, policies, guidelines and procedures for the Training Programme, completed its work at this session. Its recommendations are contained in two Conference Room Papers: LOS/PCN/SCN.2/1988/CRP.3 of 15 June 1988 and LOS/PCN/SCN.2/1989/CRP.4 of 20 March 1989.

Assumptions

2. The Chairman's Advisory Group on Assumptions, set up in 1986 to advise the Special Commission on when it might be possible to revise the current model of sea-bed mining contained in LOS/PCN/SCN.2/WP.10 and Add.1, again met during the course of the session to review this possibility.

3. As at prior sessions, the Group reviewed the current movements of and long-term projections for metal prices. The information and statistical data received from the experts of Australia, the EEC and the Secretariat showed that current prices for nickel and copper had again escalated dramatically during November and December 1988 and January 1989. The Group was, however, of the view that despite the cyclical upswing in metal prices over the last two years, long-term trend projections remain essentially the same. It is unlikely therefore that major increases in real prices of any of the sea-bed metals can be sustained over the next decade.

4. At this session, the Group did not limit its attention to metal prices and forecasts and their implications for sea-bed mining viability, but turned to the question of preparing a new list of assumptions that could be agreed to by the Special Commission and would in that event justify revision of the current model contained in LOS/PCN/SCN.2/WP.10. Its methodology is considered to be satisfactory so that the model does not need to be changed in this respect. The Group estimates that the work involved will take at least two or three sessions to complete.

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5. In keeping therefore with its general assumption that sea-bed mining will prove to be economically viable when metal prices improve and/or when capital and operating costs can be reduced with the introduction of highly efficient technologies, the Group has now decided to examine all the economic and technical factors and parameters which are relevant to sea-bed mining viability.

6. To facilitate the work involved in preparing a new set of assumptions, members of the Group will examine the list of assumptions used in the current model and come to the next session with their proposed lists of assumptions, including suggested priorities, and their proposals on the figures to be used. In this connection, the Secretariat was asked to collect as much information as possible on new technological developments in sea-bed mining and processing, as well as on any other developments which might justify changing the capital and operating costs used in the current model.

7. The expert from Australia reiterated that his country would be prepared to revise LOS/PCN/SCN.2/WP.10 for the Preparatory Commission as and when Special Commission 2 agrees on a new set of assumptions formulated by the Group.

8. The Special Commission noted that the Group has been expanded with the addition of an expert from the delegation of Canada.

Training

9. The Special Commission wishes to place on record its special thanks to Mr. Baidy Diene of Senegal, Co-ordinator of the Ad Hoc Working Group on Training, for his efforts in bringing the work of that Group to a successful conclusion. The members of that Group are also to be commended for the practical approach they adopted to the resolution of the major substantive issues that were involved in drawing up the Training Programme.

10. The Group's recommendations on the principles and policies to govern the Programme (LOS/PCN/SCN.2/1988/CRP.3) were submitted to the Special Commission at the last meeting in New York. Its recommendations on the guidelines and procedures for implementation of the Programme, and on additional policies, have now been submitted in LOS/PCN/SCN.2/1989/CRP.4. There is general agreement on the substance of the Programme, so that all that remains to be done by the Special Commission is to finalize its recommendation to the Plenary. It is to be noted that the Group did not make any recommendation on the question of financial responsibility, nor did it do so on the number of persons to be trained in the interim period. These elements of the Programme have necessarily been left to the Preparatory Commission for decision.

11. As stated in my last report (LOS/PCN/L.65, paragraph 28), we have to ensure that the drafting of our recommendation is coherent and that its different elements are harmonized. The Secretariat will therefore circulate intersessionally a Working Paper which integrates the two Conference Room Papers and takes care of any obvious drafting problems. It is understood that this final process will require no more than two meetings at the next session.

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Structure and organization of the Enterprise

12. The Working Paper (LOS/PCN/SCN.2/WP.16) prepared by the Secretariat on this item proved to be a useful means of focusing attention on the constituent elements of the Enterprise. While it is understood to be merely a convenient guide to the provisions of the Convention dealing with the Enterprise, certain problems in rendering these provisions in an organized fashion were noted, so that the Secretariat was asked to keep a record of those instances where drafting might have to be corrected in the future.

13. Two uses have been found for the Working Paper. Firstly, it will serve to identify where provisions of the Convention might require annotations by the Special Commission with a view to assisting the Authority and subsequently the Enterprise itself in making their initial decisions. In general, the Special Commission would address the need to preserve maximum autonomy for the Enterprise, in keeping with its basic commercial character and the need to ensure efficient management and a streamlined structure. It was agreed that while the Special Commission could not amend the Convention, it did not rule out liberal interpretations of its provisions as long as this did not disturb their basic purpose and intent. Secondly, the Working Paper will serve to identify those elements that would form the substance of a special recommendation to the Authority on transitional arrangements to deal with the pre-operational stage of the Enterprise.

14. Although the Special Commission has only reached article 15 in its reading of the Working Paper, it has already identified several places where annotations might be in order. Some focus on general concerns such as the relationship between the Governing Board and the Council/Assembly, where it will be important to avoid unnecessary constraints on the Enterprise. Here, it was also emphasized that the directives given to the Enterprise should be limited to those of a political or general economic character, transcending commercial considerations which are the exclusive concern of the Governing Board. It was also noted that it would be important for the Mining Code to avoid introducing constraints on the Enterprise, e.g. with respect to its procedures for the acquisition of technology. Other posssible annotations would deal directly with cases where some additional guidance is indicated, e.g. for the nomination process referred to in article 12 of the Working Paper.

15. Considerable progress has been made at the same time in understanding the issues involved in dealing more concretely with the question of a nucleus Enterprise. It is already understood that this question is best dealt with by means of a transitional arrangement which does not disturb the constitution of the Enterprise laid down in the Convention, and which is limited to a specified period that may be lengthened or shortened by the Authority depending on the circumstances at the time. Much of the discussion in this context focused on what functions a nucleus Enterprise would perform, in particular whether or not, even in the pre-operational phase, they should encompass research and development activities. It was concluded that any such function would have to be directly linked to actual operations and it would be limited at the transitional stage to the monitoring of technological developments and to the development of a strategy for technology acquisition.

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Exploration

16. The Special Commission did not have time to begin its discussion of exploration under paragraph 12(a)(i) of resolution II, for which the Secretariat had prepared a new Working Paper (LOS/PCN/SCN.2/WP.17). The main purpose of that Paper, as pointed out by the Secretariat, was to determine, in relation to the standard sequence of events in any mining industry, what the current status of pre-exploitation activities is and what would remain to be done in respect of "exploration". The Secretariat has concluded that the next step would be a "detailed regional appraisal of claimed sites", i.e. the stage which follows upon prospecting. It has emphasized that there is a basic sequence involved and that, in order for the Special Commission to deal more effectively with the issues relating to the implemention of paragraph 12(a)(i) of resolution II, it would be necessary to make clear separations between the remaining phases required to establish the exploitability of a reserved area.

Programme of work for the summer session

17. In the light of the provisional allocation of 10 meetings to Special Commission 2, the programme is as follows:

(i) Two meetings, at the outset of the session, for finalization of the recommendation to Plenary on the Training Programme;

(ii) Five meetings for the item "Structure and organization of the Enterprise", entailing firstly, completion of the article-by-article examination of LOS/PCN/SCN.2/WP.16, and then identification of the elements which relate to the nucleus Enterprise;

(iii) Two meetings for examination of the implementation of paragraph 12 of resolution II in respect of "exploration".

The final meeting for the session will be devoted to such matters as the progress made by the Chairman's Advisory Group on Assumptions and the programme of work for the eighth session.

18. The Special Commission has made significant progress at this session on the Training Programme that will be established by the Preparatory Commission. It has also made major strides in coming to grips with the kind of constructive recommendations that can be forwarded to the Authority on the structure and organization of the Enterprise, including those that would address an Enterprise in a nucleus or transitional stage. Also of great significance is the work now planned to carry forward the study of assumptions. In time, this will allow the Special Commission to proceed to a new examination of the most viable options for the first operation of the Enterprise.

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New York, 14 August-1 September 1989

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held eight of its scheduled nine meetings. Its programme of work for the session was contained in paragraph 17 of LOS/PCN/L.70. The first two meetings were devoted to the finalization of the draft principles, policies, guidelines and procedures for a Preparatory Commission Training Programme contained in LOS/PCN/SCN.2/L.6. These were adopted and submitted to the plenary on 31 August in LOS/PCN/SCN.2/L.6/Rev.1. Seven meetings were devoted to the provisions of the Convention relating to the structure and organization of the Enterprise (LOS/PCN/SCN.2/WP.16) (see LOS/PCN/L.75/Add.1). A brief discussion of exploration under paragraph 12 of resolution II, based on LOS/PCN/SCN.2/WP.17, was held at the final meeting. The Chairman's Advisory Group on Assumptions, expanded by the addition of experts from the delegations of Colombia and Thailand, met twice during the current session.

Training

2. It will be recalled that the Ad Hoc Working Group on Training had concluded its work at the end of the spring session with the completion of draft guidelines and procedures for the Training Programme. As requested by the Special Commission at the last session, the Secretariat combined the draft principles and policies for the Programme (LOS/PCN/SCN.2/1988/CRP.3) and the draft guidelines and procedures (LOS/PCN/SCN.2/1989/CRP.4) and introduced some editorial changes in the interest of coherency (see LOS/PCN/SCN.2/L.6). Some additional drafting changes were made and the draft proposal as adopted by the Special Commission was issued as LOS/PCN/SCN.2/L.6/Rev.1.

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Structure and organization of the Enterprise

3. The Special Commission completed an article-by-article reading of its working paper 16, concentrating primarily on the identification of those provisions of the Convention which called for annotations of various kinds. Since it had already identified a number of elements at the last session that would be particularly relevant to a transitional arrangement for the Enterprise, the Special Commission will pursue the matter at the next session before returning to the work of preparing annotations.

4. It is understood that annotations would serve several purposes: to allow the Preparatory Commission to comment on provisions of the Convention in the interests of promoting reasonable interpretation; to suggest supplementary draft provisions to facilitate effective application; and to suggest additional draft rules on matters such as the confidentiality requirement, on which the Convention has no rule specific to the Enterprise.

5. As at the last session, the Special Commission found that many provisions related to the central question of how to achieve the desired degree of autonomy for the Enterprise, vis-à-vis the organs of the Authority, in conformity with articles 2 and 13 (2) of annex IV of the Convention, and so preserve its fundamentally commercial character as laid down in article 1 (3) of annex IV. On the other hand, there were a number of instances where it was equally clear that the Council, and also the Assembly on some matters, would be giving directions and exercising a significant degree of control.

6. While it has not been possible on one reading to attempt a first drafting, the Special Commission has been able to identify a number of matters which clearly call for annotations. From the discussions so far, these would be expected to address such needs as:

(a) Specifying the qualifications required of nominees to the Governing Board, emphasizing the desirability of relevant practical experience (see annex IV, article 5 (1); article 12 of working paper 16);

(b) Ensuring that the relationship between the Governing Board and the Director-General does not impede the latter's ability to manage the Enterprise effectively. It is generally felt that a dynamic Director-General will be the key to the success of the Enterprise and that he should be assured of full control over day-to-day operations (see annex IV, articles 6 and 7 (2); articles 15 and 20 of working paper 16);

(c) Ensuring that the relationship between the Council and the Governing Board is more clearly defined, for example, by relating article 162 (2) (i) of the Convention (article 25 (a) of working paper 16) to annex IV, article 2, which lays down the principle of autonomous operations by the Enterprise;

(d) Providing the Governing Board, as suggested by the Secretariat in article 15 (2) (e) of working paper 16, with the additional powers to establish internal audit procedures as well as accounting procedures, as long as they are based on generally recognized accounting principles;

(e) Clarifying decision-making in the Governing Board. It is understood that decisions must enjoy the support of 8 of its 15 members and, while the Convention does not specify that they should be present and participating, it is recognized that proxy voting should not be allowed. Measures to deal with repeated absenteeism were contemplated, as was the strengthening of the provision on conflicts of interests (see annex IV, article 5 (8); article 18 of working paper 16);

(f) Elaborating on the confidentiality issue. It was agreed that the rule suggested by the Secretariat (based on rule 16 in LOS/PCN/WP.24 of September 1984) would require redrafting and expansion. The rule should establish the basic principle, applicable to the Enterprise as a whole, and elaborate upon it with respect to the Governing Board, the Director-General and staff, in order, for example, to differentiate between management and staff, and furthermore as between staff with access to confidential information in the course of their normal duties and those without such access. The draft rule should be specific also on questions of implementation, encompassing not only such aspects as post-employment sanctions, but also persons or entities external to the Enterprise who benefit from a breach of confidentiality;

(g) Resolving some of the practical problems associated with the requirement of annex IV, article 11 (3) (footnote 62 of working paper 16) that the Preparatory Commission determine the amount needed to constitute the initial fund of the Enterprise. It was generally felt that Governments should not be required to make their investments until the operational plan could be drawn up. However, since the Enterprise would need funds to cover its initial administrative expenses, this component of the initial fund should be budgeted separately. It was further noted that default by a State party with respect to its contributions to the initial fund of the Enterprise was a matter quite separate from a default with respect to the Authority's budget and deserved close attention, since the Enterprise would be wholly dependent on these contributions.

7. Other matters arising from the reading of working paper 16 concerned harmonization with Special Commission 3 on those transfer-of-technology provisions which related to the powers of the Governing Board under annex IV, article 6 (f) and (g) of the Convention (article 15 (1) (f) and (g) of working paper 16), and with the informal plenary on the rights, privileges and immunities of the Enterprise at the seat of the Authority.

Assumptions

8. The Chairman's Advisory Group on Assumptions has examined current metal price movements, long-term projections and the establishment of a new set of assumptions.

9. The information and statistical data received from the expert of Australia and the Secretariat showed that prices for nickel, copper and manganese have continued to escalate. The real price of nickel increased twofold over the price used in the

sea-bed mining model contained in LOS/PCN/SCN.2/WP.10 submitted by Australia, and the real prices of copper and managanese are close to this level as well. The Australian Bureau of Mineral Resources has updated the metal prices in that model and has again come to the same conclusion that deep sea-bed mining is not yet an economically viable proposition.

10. It was speculated whether, if the recent upward trend in metal prices were to continue, the aggregate metal price would reach a level at which sea-bed mining might be feasible with the current set of assumptions. At the same time, however, it was recognized that the long-term trend projections for the metal prices remain essentially the same.

11. Given the absence of any substantial developments in sea-bed mining technology, the Group was unable at the present stage to change the current set of assumptions used in the model. It was earlier recognized that this work would take time and that it was necessary to establish a data bank. The Secretariat has advised that the necessary facilities for a data bank are in the process of being created.

12. The Group will continue monitoring metal price movements, long-term projections and technological developments relating to sea-bed mining.

Programme of work for the eighth session

13. The programme of work will be as follows:

(i) Implementation of the Training Programme;

(ii) Transitional arrangements for the Enterprise;

(iii) Exploration under paragraph 12 of resolution II.

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STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

(Addendum)

(Statement on LOS/PCN/SCN.2/L.6/Rev.1 by the Chairman of Special Commission 2 at the 51st plenary meeting, held on 31 August 1989)

1. The document before you - LOS/PCN/SCN.2/L.6/Rev.1 - was adopted by Special Commission 2 at its 87th meeting, on 18 August. It contains a draft proposal to establish a Preparatory Commission Training Programme for the Enterprise. Its adoption here will represent the first concrete preparatory measure taken by the signatories to the United Nations Convention on the Law of the Sea on behalf of and for the benefit of the future Enterprise of the Authority.

2. The proposal for a Training Programme comes to the plenary after some years of intensive study and detailed discussion in the Special Commission. Training, to develop human resources for the Enterprise, was clearly a matter demanding its priority attention. From the annals of Special Commission 2, it is to be noted that a considerable number of working papers have been devoted to the subject of training and to the related question of the manpower requirements of the Enterprise, particularly in its early stages of development. I would mention here the following working papers:

- Working paper 2, of July 1984, on start-up requirements and preparatory measures for the Enterprise;
- Working paper 6, of February 1985, presenting a project profile of a deep sea-bed mining operation by the Enterprise;

- Working paper 7, of February 1985, on the development of an ad hoc expert core group for the Enterprise to assist the Preparatory Commission;
- Working paper 8, of February 1985, on the training needs and requirements of the Enterprise;
- Working paper 9, of August 1985, on the implementation of paragraph 12 of resolution II, and its addendum of January 1986;
- Working paper 11, of February 1987, on the main elements of a training programme;
- Working paper 13, of March 1987, on questions relating to the training of personnel for the Enterprise.

3. The history of the deliberations on the matter may be readily discerned from my reports to plenary on the progress of work in Special Commission 2. Those reports show that the Special Commission has not deviated from certain basic principles of fundamental importance. As early as 1984 and 1985, for example, and as reported in plenary documents LOS/PCN/L.5 and LOS/PCN/L.10, Special Commission 2 was placing considerable stress on the importance of developing a close co-operative relationship between the Preparatory Commission and the pioneer investors and on the need to develop a mechanism through which the registered pioneer investors could fulfil their training obligation under paragraph 12 of resolution II. It was realized that a programming approach was called for in order to achieve the overall objective set forth in the chapeau to paragraph 12 and to ensure that the total effort expended on training by each registered pioneer investor could be co-ordinated and thus maximized.

4. By 1985 and 1986, and as reported to you in plenary documents LOS/PCN/L.20, LOS/PCN/L.30 and LOS/PCN/L.40, the Special Commission was concentrating on the nature and scope of the training obligation of the registered pioneer investors. The Special Commission noted then that attention would have to be paid to finding the most efficient and cost-effective way of meeting identified training needs. It was in the same period also that longer delays were projected for sea-bed mining operations, thus compounding the difficulties surrounding the question as to the assumptions that could be made about the optimal timing for commencing specialized training. It was, however, evident that the programme would have to be formulated in such a way as to produce the best and most timely training in the most cost-effective manner.

5. It was in that same period also that the Preparatory Commission was facing delays in the registration process, with consequent effects on the ability of Special Commission 2 to make real progress with its work on training. While it remained essential for the basic design of the programme to be grounded on the scope of the training obligation of the pioneer investors - which, it was understood, could only be done with any surety following upon their registration - Special Commission 2 began to introduce an important distinction in its work as between the formulation of basic planning guidelines and modalities for a training programme, and decisions as to its actual implementation.

6. By April 1987, and as reported in plenary document LOS/PCN/L.45, Special Commission 2 was able to affirm that, while the provision of training was the obligation of the registered pioneer investors, the demands on their resources should not be excessive. As to types of training, it was now made clear that the emphasis would be on technical and scientific training with a strong practical component. It was at that stage also, with registration in sight, that the Special Commission decided to set up an Ad Hoc Working Group on Training with a mandate to draft the principles, policies, guidelines and procedures for a training programme. That Group was open-ended, with a core membership of the four pioneer applicants at the time and 12 other representatives, including the observer from the International Ocean Institute. From that time on, the Special Commission allocated a considerable portion of its meeting time to that Group, which began its work in the summer of 1987.

7. The Ad Hoc Working Group conducted its work in the order dictated by its mandate. It was able to report some progress in August 1987, as reflected in plenary document LOS/PCN/L.50, but the real progress was made following registration. As reported in plenary document LOS/PCN/L.60 of April 1988, the Group had been able to resolve the major substantive issues involved in drafting principles and policies for the Programme. This was affirmed by the Special Commission at the following session that year, so that the Ad Hoc Working Group was then able to proceed to the drafting of the consequent guidelines and procedures for the Programme. As specified in my report of August 1988 (LOS/PCN/L.65), the package was to be examined as a whole following the completion of the work on guidelines and procedures, in order to ensure that the final proposal was consistently and coherently drafted.

8. The Ad Hoc Working Group concluded its work in March 1989 when it transmitted a paper on draft guidelines and procedures to the Special Commission. Its two papers - the one containing the draft principles and policies and the other containing the draft guidelines and procedures - were then combined in one document for the consideration of the Special Commission at the present session. That paper, which was adopted by the Special Commission, is now before you and is contained in LOS/PCN/SCN.2/L.6/Rev.1.

9. Let me take this opportunity to stress the great debt of gratitude we all owe to the Co-ordinator of the Ad Hoc Working Group, Mr. Baidy Diene of Senegal, a Vice-Chairman of Special Commission 2. The co-operative spirit so evident in the work of the Group and the speed and efficiency with which it carried out its mandate are in no small measure directly attributable to the special efforts of its Co-ordinator.

10. Before moving to the salient features of the proposal itself, I should first like to emphasize that Special Commission 2 has analysed in depth and detail all of the issues involved. In respect of those issues that remain outstanding, by virtue of their continuing consideration within the overall context of the obligations of registered pioneer investors, the Special Commission has taken them into account inasmuch as the drafting does not prejudice their final resolution. Indeed, we are firmly of the view that the approach taken in the proposal may truly expedite that process.

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11. Let me now turn to the basic features of the proposed Programme. First, you will note from the opening words of the proposal that the Programme is established for the interim period and will thus be carried out in the context of pioneer activities, as defined in resolution II.

12. As to the governing principles, it should be noted that Special Commission 2 has given pride of place to the co-operative spirit of the Programme, as also may be seen in the first policy statement in paragraph 2.1 on the co-operative mechanism proposed for the implementation of the Programme. The remaining principles in the first section derive essentially from the preamble to resolution II itself and from the preamble to paragraph 12 thereof, as well as from its subparagraph (a) (ii).

13. The policies set forth in the document before you have resulted directly from the discussions held over the years in Special Commission 2 and from the more detailed examination of particular points in the Ad Hoc Working Group.

14. I should like to draw your attention to the way in which the policies of the Programme are anchored in pioneer activities. This is particularly so in the references to the registered pioneer investors in paragraphs 2.2, 2.3 and 2.9, as well as in paragraph 2.4 which specifies that "initial priority" will be given to "training in surveying and exploration and assessment of the results thereof".

15. Of particular significance for the plenary is the way in which Special Commission 2 has formulated basic policies on such thorny issues as costs and timing. The two issues are seen as being closely interrelated: paragraph 2.5 states that "the Programme will aim at maximum cost-effectiveness", and paragraph 2.6 provides that "implementation will be scheduled in such a way as to maximize the value and timeliness of the knowledge and experience gained by trainees relative to the date of establishment of the Enterprise". Paragraph 2.6 further provides that registered pioneer investors will "advise the Preparatory Commission of the financial implications of their proposed training schedules" when submitting periodic information on training opportunities that arise out of their pioneer activities. The approach taken to these issues is also implicit in the way in which the Programme would be implemented by the proposed Training Panel, and here I would ask you to note the functions of the Training Panel in paragraph 3.1.3, particularly those proposed in its subparagraphs (h) and (i).

16. On one policy matter, that was set forth in paragraph 2.11, it was not possible to resolve full the practical problem involved in obtaining assurances as to the availability of trained persons for the Enterprise. Indeed, the problem was thought to transcend the competences of the Preparatory Commission itself. While Special Commission 2 would have liked to be able to assure itself that the most highly skilled persons could be made available to work for the Enterprise when the time came, it was not considered appropriate to impose such an obligation on persons receiving training. We chose rather to ask Governments of persons trained under the Programme to co-operate in making those people available to work for the Enterprise, at its request, and also to make their services available to the Preparatory Commission itself should it so request.

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17. It will be appreciated that much of the success of the Programme will depend on the proposed Training Panel since its work is central to the whole process envisaged, and it is here that further actions are called for by the plenary pursuant to the adoption of the paper in question.

18. The first item of business will be to compose the Panel. With respect to paragraph 3.1.2, it may be necessary to elaborate somewhat upon the kind of expertise required. Some guidance on the matter may in fact be inferred from the table in LOS/PCN/BUR/R.6, the report of the Group of Technical Experts to the General Committee, in which are outlined the priority disciplines which training should address. It follows, naturally, that the expert members of the Training Panel would need to be well qualified in some of these same fields. Given the multidisciplinary aspects of some of the training suggested, which can be noted from that paper, it would also be important for Panel members to have considerable practical experience, especially in project management. Special Commission 2 has itself noted in the past that it would be advisable to include on such a Panel expertise in training itself.

19. It is perhaps worthy of note that Special Commission 2 has tried to avoid incurring unnecessary costs by emphasizing that the Training Panel should meet normally during meetings of the Preparatory Commission. With respect to the status of the members of the Training Panel, we are silent on the point, preferring to assume that they will be attached to delegations and their costs absorbed by the Governments of those delegations. That is, however, in the final analysis a matter for the Preparatory Commission to decide.

20. Special Commission 2 trusts that the Panel can be established as soon as possible. The registered pioneer investors have indicated that they are ready to begin providing training and thus could submit their training schedules without much further delay. According to the process outlined in paragraph 3.1.3, the Panel would then take that information and establish a combined schedule for the period involved, giving all the necessary details on each individual traineeship to be offered. The Secretariat would then transmit this information to Governments and invite nominations against each traineeship. These nominations would be entered on the Register, from which the Training Panel would make its selections. Those persons would be recommended to the Preparatory Commission for designation as trainees under the Programme. Under paragraph 3.2.4, the nominating Governments of designated persons are asked to facilitate the availability of those persons at the time and for the period established in the particular traineeship. It is understood that persons who were not selected would remain in the Register and could be renominated at the next opportunity by their Governments, which would provide information on any additional qualifications and experience that candidates may have acquired in the mean time.

21. These are the initial steps to be taken. Subsequent steps are outlined in subparagraphs (e) to (j) of paragraph 3.1.3. on the functions of the Training Panel. I would, however, draw your attention to subparagraph (k), in which the Special Commission has anticipated that there may be other relevant training in the offing which should be brought to the attention of the Preparatory Commission in order to facilitate the dissemination of information on such further training opportunities.

22. I am hopeful, given the history of this subject, that we can now expedite the actions required and have the first Preparatory Commission trainees in place in the near future.

23. Members of the Special Commission remain at the disposal of the plenary to answer any questions which any delegation may have at this stage. I know I can count on Mr. Baidy Diene of Senegal to assist in this regard. The honour and privilege have fallen to me to present the proposal on draft principles, policies, guidelines and procedures for a Preparatory Commission Training Programme, as contained in document LOS/PCN/SCN.2/L.6/Rev.1. I have great pleasure, therefore, in submitting it to the plenary of the Preparatory Commission for its consideration and adoption.

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INTERNATIONAL SEA-BED AUTHORITY
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Eighth session
Kingston, Jamaica
5-30 March 1990

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. The Special Commission held ten meetings at the current session, and time was also set aside from its schedule for three meetings of the Chairman's Advisory Group on Assumptions and for Expanded Bureau meetings on the question of implementation of the Preparatory Commission's Training Programme. Given the attention devoted to this last matter, the Commission was not able to reach all of the items on its programme of work for the session, as laid down in paragraph 13 of LOS/PCN/L.75.

Assumptions

2. Mr. S. L. Rai of the delegation of India, Acting Co-ordinator of the Chairman's Advisory Group on Assumptions, reported that the Group had examined the current developments in market prices of copper, nickel, cobalt and manganese, and a paper entitled "Manganese Nodule Industrial Venture Would be Profitable: Summary of a Four-Year Study in France". This paper had been presented at the 21st Annual Offshore Technology Conference (OTC) held at Houston, Texas, USA in May 1989.

3. Developments in metal prices were reviewed on the basis of the statistics compiled by the Secretariat and a note presented by the Australian expert. It was observed that whereas the prices of copper and nickel had fallen since August 1989, the manganese price had gone up. The cobalt price had shown a fairly high degree of stability in recent years.

4. Market analysts are divided on the outlook for the copper price although most agree that it is unlikely to rise strongly. It is believed that nickel prices, though unlikely to collapse to the levels of the early 1980s, could well settle at the current level. Relative stability in cobalt prices is predicted for the medium to long-term. The outlook for manganese is for continued strong demand and increases in prices until at least the mid-nineties.

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5. The OTC paper presents the results of a four-year programme devoted to the technical and economic study of nodule exploitation, undertaken by GEMONOD, a French public interest group comprising IFREMER, Commissariat à L'Energie Atomique (CEA) and TECHNICATOME. The study was based on the French pioneer area in the central Pacific. It assumes that the project would have a nominal capacity of 1.5 million tonnes of dry nodules, extracting copper, nickel, cobalt and manganese in a processing plant located in France. An hydraulic recovery system with a self-propelled collector, was selected for mining. The study claims excellent results for a pyrometallurgical-cum-hydrometallurgical extraction process.

6. A complete economic study was performed in 1988 based on technical studies carried out earlier. It was estimated that the total investment would be $US 940 million (mining 30%, transportation 20% and processing 50%) and the operating costs, $US 240 million (mining 20%, transportation 15% and processing 65%). The average annual cost of exploitation (operating costs and investment costs) over 21 years of production was calculated at $US 220 per tonne of dry nodules. The revenues generated were estimated to be $US 330 per tonne of dry nodules, using projected prices which are considered by the authors to be conservative on the whole.

7. The internal rate of return is estimated at 12% regardless of the source of financing. However, on the basis of a 50% equity and 50% ten-year loan, the internal rate of return would be 14%. The investment pay-back period would be 6 years from the date of production at full capacity. The paper argues that the above profitability figures, obtained in 1988, are acceptable for mining projects of this dimension. The paper further claims that the more favourable outcome of the GEMONOD study as compared to other recent studies is attributable to the difference in the efficiency of the processing which represents 60% of the total cost. It was also estimated that nodule mining would be comparable to laterite nickel ore exploitation, as far as future profitability is concerned.

8. While these results are different from those of previous studies, the paper stresses the technologically innovative nature of the nodule project and the risks involved. It expects that commercial scale deep sea-bed mining could begin in 10 to 20 years. However, a pilot phase to be undertaken between 5 and 10 years after the beginning of feasibility studies would most certainly be necessary.

9. The Group felt that the new paper contains many interesting and important features. However, it is merely a summary of a larger work and does not present enough details to permit a thorough comparison with the earlier Australian study submitted in LOS/PCN/SCN.2/WP.10 and Add. 1. In spite of this handicap, the Group identified two significant differences between the two studies. Firstly, the OTC paper concludes that a French project with an annual production capacity of 1.5 million tonnes is economically attractive. The members of the Group noted that there are a number of implications of this capacity in several related areas. Secondly, it was noted that whereas the add-on manganese plant in the Australian study had had a negative effect on the profitability of the whole model, in the French study, manganese contributes

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substantially to the project's profitability. This is due to a more efficient recovery by the pyrometallurgical process. It was stressed, however, that since this process is energy-intensive, profitability will largely depend on the source and price of energy. The OTC paper implies the possible use of nuclear energy.

10. The Group recognized that fuller details of the French study are needed for more substantive comparison and evaluation with respect to the Australian study. The Group, has therefore appealed to the French delegation to use its good offices to obtain from GEMONOD details of their study, in order to enable the Group to examine all the economic and technical factors and parameters involved. The expert from Australia reiterated the understanding reported in LOS/PCN/L.70, paragraph 4, that his country would be prepared to revise LOS/PCN/SCN.2/WP.10 for the Preparatory Commission as and when they are given an agreed set of assumptions by Special Commission 2.

11. The Group expressed its appreciation to the Australian expert and the Secretariat for their continued assistance to the work of the Group.

Training

12. It will be recalled that, at the last session, the Preparatory Commission adopted "Principles, Policies, Guidelines and Procedures for a Preparatory Commission Training Programme" which are contained in LOS/PCN/SCN.2/L.6/Rev.1. At this session, in accordance with its programme of work, the Commission proceeded to examine ways and means of expediting implementation of the Programme, bearing in mind particularly the various administrative and time-consuming steps required for its initiation. On the basis of a number of suggestions advanced by the Chairman, and using the device of informal Expanded Bureau meetings, in which the registered pioneer investors were active participants, the Special Commission has been able to make a number of recommendations for this purpose. These are contained in LOS/PCN/SCN.2/L.7 and are submitted to the plenary for its adoption today. While not complete in every respect, they nonetheless will enable the necessary steps to be taken to initiate the Programme without undue delay. With their adoption by the plenary, the work of Special Commission 2 on the subject of training will be complete.

Transitional Arrangements for the Enterprise

13. Following upon a request of the Special Commission at its first meeting on this subject at the present session, the Chairman prepared a short paper, LOS/PCN/SCN.2/1990/CRP.5, setting forth the main elements for consideration, as derived from earlier discussions in the Special Commission and from various working papers prepared by the Secretariat, particularly LOS/PCN/SCN.2/WP.12 and WP.15.

14. Certain suggestions are advanced in the Chairman's paper as regards specifying the purpose of Transitional Arrangements and the functions that would be performed in the course of a transitional, pre-operational period. These would include not only basic monitoring functions, but also functions of a preparatory nature, such as identification of the most suitable option for the first Enterprise operation and identification of the area to be selected for that first operation.

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15. It has long been emphasized in Special Commission 2, that form must follow function, so that questions as to the status and structure of the institutional arrangement or arrangements for the transitional period are to be resolved accordingly. It will also be recalled that the Special Commission has been consistent in its insistence on efficient and cost-effective institutional measures. However, there has been no ready answer as to the institutional option that should be recommended. The paper has thus outlined three options for consideration. The Special Commission has noted however - and this is reflected in the paper itself - that the choice may not be categorical, since it might be advisable to allow for a natural evolution over the period in question. Indeed, from the discussions during the one short meeting on the paper, there is every indication that the transitional period should be seen as presenting a dynamic, rather than a static process.

16. Some delegations have taken the view that the institutional aspect of Transitional Arrangements presents a choice, between establishing the Enterprise as an organ of the Authority, no matter how limited its functions, and introducing a prior, quite separate arrangement, which would not imply any modification of, or deviation from Annex IV of the Convention. On the other hand, some find merit in exploring the possibility of defining a nucleus Enterprise which would still have the necessary elements to ensure autonomy, e.g. a governing board, possibly called an Advisory Board, but with less than fifteen members, and a director or executive manager rather than a Director-General. Others again, see no real necessity to recommend one particular option since one phase can succeed another in response to future developments and consequent additional functions. While it was not possible to further refine such questions at the present session, one point has emerged very strongly, namely, that it will be necessary, from the beginning, to appoint a Director-General, or the equivalent, to work full-time on matters pertinent to the Enterprise. Moreover, this person must be given a separate budget, in other words, one which is not hidden within the broader administrative expenses of the Authority.

17. In the opinion of Special Commission 2, the issues involved in this question of Transitional Arrangements hold particular importance for the Preparatory Commission. Thus the matter will be taken up as a first priority at the next session, with the hope of being able to forward a recommendation to the plenary.

Programme of work for the resumed eighth session

18. The programme of work will be as follows:

(i) Transitional Arrangements for the Enterprise;

(ii) Structure and organization of the Enterprise, entailing preparation of annotations on LOS/PCN/SCN.2/WP.16;

(iii) Exploration under paragraph 12 of resolution II;

(iv) Other matters arising from paragraph 12 of resolution II, including its sub-paragraphs 12 (a)(iii) and 12 (b), on which recommendations may be needed.

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New York, 13-31 August 1990

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held eight meetings at the current session. Its programme of work for the session was contained in paragraph 18 of LOS/PCN/L.80. Five meetings were devoted to the consideration of transitional arrangements for the Enterprise as contained in the Chairman's paper, LOS/PCN/SCN.2/1990/CRP.5. Two meetings were devoted to the provisions of the Convention relating to the structure and organization of the Enterprise (LOS/PCN/SCN.2/WP.16). An Ad Hoc Working Group on the status and structure of the institutional arrangement or arrangements for the transitional period, consisting of the delegations of Argentina, Belgium, Cameroon, the Federal Republic of Germany, Gabon, India, Italy, Japan, Mexico, Nigeria, the Republic of Korea, Senegal, Thailand and Yugoslavia met twice during the session. The Chairman's Advisory Group on Assumptions met four times during the session.

Transitional arrangements for the Enterprise

2. The suggestions advanced in the Chairman's paper on the subject (LOS/PCN/SCN.2/1990/CRP.5) resulted from earlier discussions in the Special Commission and from various working papers prepared by the Secretariat, particularly LOS/PCN/SCN.2/WP.12 and WP.15, which served as the basis of the Special Commission's deliberations.

3. The Special Commision undertook a paragraph-by-paragraph reading of the paper with a view to reaching a consensus on, inter alia, the purpose of transitional arrangements, the functions to be performed under transitional arrangements, the status and structure of the institutional arrangement and rules applicable to the transitional arrangements. In so doing, the Special Commission agreed that form must follow function.

4. In the discussions on the purpose of transitional arrangements, the view was expressed that although the Chairman's paper depicted the Enterprise as evolving from an initial nucleus or core, that did not however imply a separate form. It

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was proposed that the core be subsumed under one of the organs of the Authority. Another point of view was for the Enterprise to be set up as a separate entity and not be integrated in one of the organs of the Authority. It was concluded that since the language used in LOS/PCN/SCN.2/1990/CRP.5 was ambiguous and left the question open, it enabled the Authority to decide at a later date what kind of structure there should be.

5. Special Commission 2 agreed that the purposes of transitional arrangements for the Enterprise could be described as those of:

(a) Generally ensuring the continuity of the work initiated by the Preparatory Commission, introducing modifications and additions as required;

(b) Providing a focus within the Authority for the collection and analysis of all information and data pertinent to the development of the sea-bed mining industry;

(c) Providing expert advice on the scientific, technical and economic aspects of the Authority's policies and programmes relating to the Enterprise;

(d) Providing a mechanism for the implementation of the Training Programme for the Enterprise, initiated by the Preparatory Commission.

6. During its deliberations on the functions to be performed under the transitional arrangements, the view was expressed that the nucleus Enterprise's only function should be to monitor and report on all developments in or affecting the sea-bed mining sector. It was pointed out that the fact that sea-bed mining would not be viable for another 15 to 20 years rendered the additional functions contained in CRP.5 not necessary in the initial stages. These functions are:

(a) The elaboration of options available to the Enterprise (as first attempted in LOS/PCN/SCN.2/WP.6 and Add.1 and Corr.1) which in time would entail detailed studies of such aspects as:

(i) The availability of capital from financial markets;

(ii) The particular requirements and implications of a joint venture approach to operations;

(b) The study of available data and information on areas reserved for the Authority to determine which reserved area warranted further exploration; and,

(c) The elaboration of a managerial policy on the basis of which the rules and regulations for the administration of the Enterprise could be formulated.

7. Although there was basic agreement with the need for flexibility in functions during the pre-operational phase, the view was held that the formulation contained in CRP.5 on additional functions reflected the fact that the pre-operational phase was evolutionary. It argued for an active Enterprise whose experts could in due time undertake the studies included in the additional functions. It noted that the

studies would be relied upon and would permit the Enterprise to obtain capital from financial markets when the need arose.

8. On the subject of its monitoring and reporting function, it was felt that the nucleus Enterprise need not carry out primary research in cases where information was already available. It was pointed out that the information on the world metal markets was available in institutions such as the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and the United Nations Conference on Trade and Development (UNCTAD). Information on new developments in sea-bed mining could be obtained from several organizations and information on research regarding the environmental effects of sea-bed mining would in any event be collected by the Authority. Proposals were therefore made to introduce the following language in this function:

> "The performance of this general function should be based on the use of existing data and information and would require a close co-operative relationship with entities engaged in surveying and prospecting or other activities analagous to pioneer activities, as well as national institutions engaged in relevant research and development activities. Equally, it would entail close co-operation with a number of international organizations, such as IBRD, UNCTAD, United Nations Educational, Scientific and Cultural Organization (UNESCO)/Intergovernmental Oceanographic Commission (IOC) and the United Nations Environment Programme (UNEP), as well as the United Nations itself."

9. Another view was that by introducing such language, the Enterprise would be placed in a strait-jacket because it would not be able to obtain information required in areas where gaps existed. It was noted that it would be ludicrous to think that the nucleus Enterprise would go out and do its own research when the information it sought was already available. It was pointed out that the formulation contained in CRP.5 on information and data defined the principle required and that it expressly called for close co-operation between the Enterprise and the international organizations referred to in the paper.

10. The Ad Hoc Working Group on the status and structure of the institutional arrangement met twice. With regard to this subject the Group agreed that an evolutionary approach was necessary, involving minimal financial implications. The Group was not able to arrive at a conclusion on the priorities to be assigned. It was the opinion of the Group that the Chairman should assess the need for continuing with this dialogue at the next session.

Structure and organization of the Enterprise

11. The Special Commission continued its article-by-article reading of its working paper 16, concentrating on the identification of those provisions of the Convention which called for annotations of various kinds. It will be recalled that the understanding in the Special Commission is that annotations would serve several purposes: to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretation; to suggest supplementary draft provisions to facilitate effective application; and to suggest

additional draft rules on matters such as the confidentiality requirement, on which the Convention has no rule relating to the Enterprise.

12. It was suggested that in paragraph 3 of article 3 (Purposes of the Enterprise), as a result of the need to preserve the marine environment, reference should be made to regulatory requirements in addition to commercial considerations. While the need to preserve the marine environment enjoyed the full support of the Special Commission, it was pointed out that the article was not the place in which to reflect this concern.

13. A view was expressed that the reference to "special interests" in article 11 (Equitable geographical distribution and the representation of special interests) was inaccurate. It was pointed out that the provision used as its basis article 163, paragraph 4, of the Convention when the more relevant article was article 5, paragraph 1, of annex IV. It was noted that in the latter article of the Convention no reference was made to "special interests". Other delegations expressed their satisfaction with the present provision contained in the working paper.

14. It was re-emphasized that article 23 on confidentiality would require redrafting and further elaboration. In paragraph 1, the question was raised as to the power of the Governing Board to impose sanctions for breach of confidentiality in relation to the post-employment period. It was pointed out that in municipal law sanctions were limited to a certain period of time. In respect of paragraph 2, a question was raised as to which organ had the competence to establish financial liabilities and their extent. It was also pointed out that as breaches may vary in magnitude, sanctions would need to reflect that. It was noted that the article on confidentiality would be equally applicable to the pre-operational Enterprise.

Draft basic joint venture contract

15. At its 105th meeting, the Special Representative of the Secretary-General for the Law of the Sea introduced a working paper on a draft basic joint venture (LOS/PCN/SCN.2/WP.18 and Add.1). In introducing the paper, the Special Representative pointed out that joint venture arrangements as a method of operation for the Enterprise had been the subject of consideration by the Preparatory Commission at various times since 1983.

16. The working paper outlines the different types of joint ventures open to the Enterprise, as well as providing a model joint venture contract. Of the two types of joint ventures, incorporated and contractual, the paper points out that the latter might offer advantages for the Enterprise as well as for other entities. Joint ventures, the paper also states, could also be used for reserved and unreserved areas in order to limit capital and loan requirements of the Enterprise, to reduce risks and liabilities, to provide training opportunities and to facilitate the transfer of technology.

Assumptions

17. The Chairman's Advisory Group on Assumptions devoted its discussions to the current market developments in respect of nickel, copper, cobalt and manganese and

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continued to examine economic and technical factors and parameters for arriving at a new set of basic assumptions for a deep sea-bed mining model.

18. On the basis of statistics compiled by the Secretariat and a note presented by the Australian expert, it was observed that prices for nickel appeared to be stabilizing at fairly high levels after a sharp fall at the beginning of the year. Copper prices had fluctuated during 1990 and remained well above the average. The price of manganese had maintained a buoyant tendency, and the cobalt price was still stable.

19. The current prognosis for the nickel market is modest but the industry regards the present level of the price of nickel as more normal than the highs recorded in 1988-1989. This price appears to be profitable for existing nickel producers. Copper prices are expected to continue to be firm for the remainder of 1990 as stocks are low and demand is outstripping supply. Prices for manganese are likely to remain strong until the mid-1990s. The outlook for cobalt is for continued stability during the medium to long term, barring major economic upheavals.

20. The Group continued to examine the summary of the French study contained in the Proceedings of the Offshore Technology Conference and compared the main economic and technical factors and parameters with respect to the Australian study in order to arrive at a set of basic assumptions different from those used in LOS/PCN/SCN.2/WP.10 and Add.1. The Group identified areas where further clarifications were needed as well as crucial assumptions which should be introduced into the Australian model. It was decided to contact the GEMONOD group during the inter-sessional period in order to obtain further details so that a new set of assumptions could be established by the Group and approved if possible at the next Kingston session and then incorporated into the Australian model. The new results which could be achieved might be of interest to the Preparatory Commission.

21. Special Commission 2 was of the view that in the light of the possible agreement on the obligations of the registered pioneer investors, the Training Panel should be put in place at the current session and should begin to implement the first and possibly second phase of the Training Programme.

Programme of work for the ninth session

22. The programme of work will be as follows:

(i) Transitional arrangements for the Enterprise: finalization of recommendations;

(ii) Structure and organization of the Enterprise: recommended annotations on LOS/PCN/SCN.2/WP.16;

(iii) Operational options referred to in LOS/PCN/SCN.2/WP.18 and Add.1;

(iv) Other matters arising from paragraph 12 of resolution II, including its subparagraphs 12 (a) (i), 12 (a) (iii) and 12 (b), on which recommendations may be needed.

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Ninth session
Kingston, Jamaica
25 February-22 March 1991

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held ten meetings at the current session. Its programme of work for the session was contained in paragraph 22 of LOS/PCN/L.85. Five meetings were devoted to the consideration of transitional arrangements for the Enterprise as contained in the Chairman's paper, LOS/PCN/SCN.2/1990/CRP.5 and its Addenda 1 and 2. Five meetings were devoted to the consideration of the provisions of the Convention relating to the structure and organization of the Enterprise as contained in LOS/PCN/SCN.2/WP.16. The Chairman's Advisory Group on Assumptions met twice during the session.

Transitional arrangements for the Enterprise

2. The Special Commission continued its paragraph-by-paragraph reading of the paper with a view to reaching a consensus on inter alia the purpose of transitional arrangements, the functions to be performed under the transitional arrangements, the status and structure of the institutional arrangements and rules applicable to the transitional arrangements.

3. With regard to Part I of the paper, Purpose of the transitional arrangements, there was general agreement. It was also agreed that whatever structure was chosen to fulfil the purpose of the transitional arrangements, it should be cost effective.

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4. The Special Commission reached agreement on Part II of the paper, Functions to be performed under the transitional arrangements, by redrafting, as appropriate, some of its provisions to take into account (i) the time when it becomes necessary to perform these functions; (ii) the organ which would give the go ahead to initiate these functions and (iii) the discretion to be given to that organ to make those decisions.

5. As a result of this agreement, paragraph 1(b) was redrafted to read as follows:

> 1(b) "Collection of information on the availability of technology and trained manpower and the evaluation of technological developments."
>
> A new subparagraph (d) was introduced to read as follows:
>
> 1(d) "Assessment of criteria and data relating to prospecting and exploration".

6. The chapeau of paragraph 2 of Part II was redrafted to reflect that the functions listed therein would only take place at some time during the transitional period and not in its early stage. It was also redrafted to indicate that the decision to initiate these functions rested with the competent organ of the Authority. The new chapeau of paragraph 2 of Part II now reads as follows:

> "Another function which could, if appropriate, be undertaken at an early stage would be the elaboration of options available to the Enterprise (as first attempted in WP.6 and its Add.1). Subject to a decision by the competent organ of the Authority, this would also in time entail detailed studies of such aspects as:"

7. Similarly, in paragraph 4 of Part II, the agreed new text is as follows:

> "Finally, it will be necessary to elaborate a managerial policy on which basis the rules and regulations for Enterprise administration can be formulated."

8. With regard to Part III, Status and structure of the institutional arrangements, consultations within the Special Commission resulted in three possible options for the status and structure of the institutional arrangement. The first option as contained in CRP.5 was retained and it represents a neutral option. Delegations will recall that this option is the one rendered in Figure 2 of WP.15 and that its size follows from the limited functions described in that figure.

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9. A new option 2 was agreed upon and its text reads as follows:

> "A second option is to substitute the Governing Board by the Authority and the Director-General by an Interim Co-ordinator who will be entrusted with the performance of the early functions of the Enterprise until mining is about to begin."

10. The new option 3 that was agreed upon reads as follows:

> "A third option is to elect a small interim Governing Board and appoint an interim Director-General to supervise a small group of experts from the Authority."

11. Although it was the expressed desire of the Special Commission to be able to recommend a single option, it was, however, unable to reach a consensus on what that option should be. Intersessionally it is planned that consultations take place to determine if a compromise text for a single option can be reached.

12. With regard to Part IV, Rules applicable to the transitional arrangements, it was agreed that reference be made to the results of the discussions taking place within Special Commission 2 on LOS/PCN/SCN.2/WP.16, in particular its article 23 on the question of confidentiality. That question is also under consideration in the Informal Plenary.

13. It was pointed out in the discussion on the subject that pioneer and potential investors would be carrying out activities that go beyond those activities outlined in Part II of LOS/PCN/SCN.2/1990/CRP.5 and its Add.1. It was also pointed out that as a result of the understandings reached with the registered pioneer investors in respect of training and exploration on behalf of the Enterprise, a need seems to exist to harmonize and co-ordinate these activities in order to ensure that when mining was ready to begin, the Enterprise would have the requisite human, scientific and technological resources. To this end, it was requested that the Special Commission review the activities that are to be undertaken on behalf of the Enterprise prior to the entry into force of the Convention and in the period before the commencement of sea-bed mining.

Structure and organization of the Enterprise

14. The Special Commission concluded its final article-by-article reading of working paper 16, concentrating on the identification of those provisions of the Convention which called for annotations of various kinds. It will be recalled that the purpose of the annotations was: to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretation; to suggest supplementary draft provisions to facilitate effective application; and to suggest additional draft rules on matters such as the confidentiality requirement, on which the Convention has no rule relating to the Enterprise.

15. In its final reading the Special Commission considered it necessary to revise some of the annotations which it had made at previous sessions.

16. In article 1 (Use of terms), it was agreed to include the term Governing Board and to define it as follows: "The Governing Board means the Governing Board of the Enterprise". It was decided not to include a definition of the term "nucleus Enterprise" in the article but to state in the annotation that the definition and functions of the nucleus Enterprise were defined in a separate paper.

17. With respect to article 12 (Nominations), the Special Commission decided to revise the annotation it had made at a previous session. While it reaffirmed that the candidates for election to the Governing Board should have technical and relevant practical experience, it feared that a reference to document LOS/PCN/BUR/R.6 in the annotation would restrict the range of technical fields to those contained in that document and would exclude candidates with, for example, financial accountancy experience. The suggestion was made to either delete the reference to LOS/PCN/BUR/R.6 or to add the following sentence to the annotation: "It was felt that a combination of expertise in various disciplines be represented on the Governing Board, for example, financial accounting and administrative and project management".

18. With respect to paragraph 1 of article 13 (Term of office), the Special Commission again considered it advisable to revise the annotation it had made previously. That annotation had proposed that, in the interest of continuity of membership of the Governing Board, a maximum of 5 members only be rotated every 4 years for the first 12 years. In reviewing the annotation, the Special Commission considered it preferable not to specify the number of members who should be rotated but rather to leave the question to be decided after the 4 year term of office had been completed. Practice, it was thought, would determine the number of members who would be re-elected and those who would be changed. It was decided to reword the annotation as follows: "With respect to paragraph 1, it was proposed that a method should be found to rotate the membership of the Governing Board in such a way as to ensure continuity".

19. It was agreed that the annotation to paragraph 1(a) of article 15 (Powers and functions of the Governing Board) was more appropriately placed under paragraph 1(b) of the article which dealt with the rules of procedure of the Governing Board. It was re-emphasized that the length of the Chairman's tenure needed to be specified and that a system of rotation should be provided for. It was also pointed out that it was usual practice to provide for one or two Vice Chairmen. The Special Commission agreed to revise its annotation as follows: "It was suggested that the Governing Board should include in its rules of procedure some rules regarding the length of the term of office of the Chairman, the question of rotation of the Chairman and the members of the Governing Board as well as the question of equitable geographical representation on the Board."

20. It was further suggested that the Governing Board should in its rules of procedure take into account the possibility of consultations on non-substantive matters being undertaken by the Chairman and some of the members of the Board

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outside of the framework of a meeting of the Board. This procedure would, for example, apply to budgetary matters which did not involve any additional expenses. The Chairman could communicate with the members by mail and obtain their views on such matters.

21. With respect to paragraph 2(e) of article 15, it was noted that Special Commission 3 would soon be discussing accounting principles and procedures on the basis of document LOS/PCN/SCN.3/WP.6/Add.7, and that the annotation would need to contain a reference to that document. It was noted further that if the accounting principles and procedures contained in the LOS/PCN/SCN.3/WP.6/Add.7 were accepted by Special Commission 3, they would be part of the generally recognized accounting principles in accordance with which the Enterprise was to establish its accounting procedures.

22. The discussions on article 16 (Quorum for meetings), article 17 (Voting rights) and article 18 (Decision-making) centered on the possibility of votes being blocked if only two thirds of the members of the Governing Board were able to attend a meeting of the Board and a decision had to be taken by a majority. Two suggestions were made to deal with the problem: one, that proxy voting should be permitted; and two, that the Governing Board could provide in its rules of procedure that where a decision had to be taken by a quorum the decision of a member who could not be present had to be confirmed by a postal ballot. It was recalled that at a previous session, a small group had looked at the possibility of proxy voting and had decided that it should not be permitted. It was observed that proxy voting was only possible if there was a quorum. In this connection it was pointed out that it was the responsibility of the Chairman to ensure that the members of the Board were able to attend a meeting. It was recognized that once a quorum was established, and a decision needed to be taken by a majority, proxy voting should be permitted where it was not possible to get a majority. Advanced information on matters which would be discussed at the meeting would need to be sent to the members of the Board so that the members voting by proxy would have all the necessary information. The Special Commission understood majority in paragraph 1 of article 18 to mean majority of the members of the Governing Board.

23. It was observed that since paragraph 2 of article 18 did not derive from the Convention, the provision should be hortatory and not obligatory in respect of arriving at decisions on the basis of consensus or general agreement. It was decided to delete paragraph 3 which contained the definition of "consensus". The Special Commission agreed to reword paragraph 2 as follows: "Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement".

24. The Special Commission decided to delete the annotation it had made at a previous session to paragraph 3 of article 19 (The Director-General). It was considered inadvisable to provide for a probationary period for the Director-General and rules in the event of his incompetency. It was thought that the length of the term of office of the Director-General depended upon his performance. It was agreed that most of the elements which had been raised in the annotation would, in any event, be covered by the terms and conditions of the Director-General's contract.

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25. With respect to article 23 (Confidentiality), it was agreed that the annotation which had been made previously required further elaboration. It was proposed that in paragraph 1 the scope of the term "staff" needed to be defined so as to make it clear that the provision applied to all staff, whether permanent, short-term, temporary staff or consultants. It was suggested that in the case of independent contractors an agreement could be drawn up with the Enterprise which would exempt it from any liability for their acts.

26. It was proposed that paragraph 2 should state that the Enterprise and its officers and staff were jointly and severally liable for any damages for breach of the obligations set forth in paragraph 1. It was also considered necessary to establish a time-limit for post-employment sanctions. It was felt that some of those sanctions were too onerous. It was pointed out that some information would no longer be considered confidential once it had entered the public domain. It was suggested to add to the annotation that a former employee should not be held liable in perpetuity.

27. In the first line of subparagraph (1) of article 25 (The Council) it was agreed to add the words "and take a decision" after the word "Consider".

28. With respect to article 39 (Rights, privileges and immunities), it was agreed to add the following sentence to the annotation: "The Enterprise is a commercial entity and should be treated like other commercial entities under the most favoured nation clause".

Assumptions

29. The Chairman's Advisory Group on Assumptions discussed price movements in the four metals (nickel, copper, cobalt and manganese) and studied a preliminary paper comparing some of the characteristics of the Australian study and a recent study done by French experts from GEMONOD.

30. According to the information and data available to the Group, nickel prices have recovered since their fall at the beginning of 1990. Nickel prices, in all probability, will remain within the current price range throughout 1991. Copper prices fluctuated considerably during 1990, but the annual average price remains well above the average price recorded in the 1980s. There is increasing evidence that demand for copper will weaken in 1991 and that this will exert some downward pressure on its price. The manganese market shows a continuation of a buoyant price tendency. Demand for high grade manganese ore has strengthened over the past three years and the manganese market remains tight. Manganese prices are therefore likely to remain strong. Cobalt prices still have a fairly high degree of stability. There appears to be no reason to assume that existing relative stability in cobalt prices will fail to continue in the medium to long term. With stock levels for most of the base metals well above recent levels, metal prices are unlikely to rise significantly in the short-to-medium term. Substantial price falls are, however, not expected.

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31. The Group began to study a paper submitted by the delegation of Australia which presented a preliminary comparison of some of the assumptions contained in their study on the economic viability of deep sea-bed mining (LOS/PCN/SCN.2/WP.10 and Add.1) with those of a study done by experts of GEMONOD in France. The French study is based on the results of a four-year programme outlined in the 1989 Offshore Technology Conference proceedings. This study proceeds from the assumption that an annual rate of nodule production of 1.5 million mt would be more economically feasible with a pyrometallurgical process for higher manganese recovery. As in the Australian study, the US Bureau of Mines computer simulation programme was used.

32. Following further clarification at the next session in New York, the Group intends to consider thoroughly the final version of the comparison to be submitted by the delegation of Australia and then present appropriate recommendations to the Special Commission.

33. The Group is grateful to the experts from Australia and the European Economic Community for their efforts and contribution to its work.

34. The Group has been strengthened by the addition of an expert from the Republic of Korea.

Programme of work for resumed ninth session

35. The programme of work will be as follows:

1. Operational options with special reference to the joint venture option as contained in document LOS/PCN/SCN.2/WP.18 and its Add.1;

2. (i) Other matters arising from paragraph 12 of resolution II, including its subparagraphs 12 (a) (i), 12 (a) (iii) and 12 (b), on which recommendations are needed to fulfil the mandate of Special Commission 2;

(ii) Any residual matters regarding the implementation of the Training Programme under paragraph 12 (a) (ii) of resolution II;

3. Finalization of recommendations to the Plenary of the Preparatory Commission on:

(i) Transitional arrangements for the Enterprise;

(ii) Annotations on the provisions of the Convention on the structure and organization of the Enterprise as contained in document LOS/PCN/SCN.2/WP.16;

4. Harmonization and co-ordination of activities in respect of exploration and training prior to the entry into force of the Convention and in the period before sea-bed mining is about to begin.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Ninth session
Kingston, Jamaica
25 February-22 March 1991

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

(Corrigendum)

Page 3, paragraph 13 should read

13. It was pointed out in the discussion on the subject that pioneer and potential investors would be carrying out activities that might go beyond those activities outlined in Part II of LOS/PCN/SCN.2/1990/CRP.5 and its Add.1. It was also pointed out that as a result of the understandings reached with the registered pioneer investors in respect of training and exploration a need seems to exist to harmonize and co-ordinate these activities. To this end, it was requested that the Special Commission review the above.

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New York, 12-30 August 1991

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held seven meetings at the current session. Two of its scheduled meetings were given over to the first meeting of the Training Panel to enable it to commence its work on the Training Programme. The programme of work for the session was contained in paragraph 35 of LOS/PCN/L.90. As a result of the limited number of meetings, the Special Commission was only able to consider the first item on its programme of work, namely operational options with special reference to the joint venture option as contained in document LOS/PCN/SCN.2/WP.18 and Add.1. The Chairman's Advisory Group on Assumptions met twice during the session, and consultations between the Coordinator of the Contact Group of the Group of 77 on Special Commission 2 Matters and the Coordinator for the Group of Six continued with regard to recommending a single option for the status and structure of the institutional arrangement during the transitional period as contained in the Chairman's paper, LOS/PCN/SCN.2/1990/CRP.5 and Add.2.

Operational options with reference to the joint venture option as contained in document LOS/PCN/SCN.2/WP.18 and Add.1

2. The Special Commission recalled that at its 105th meeting the Special Representative of the Secretary-General for the Law of the Sea had introduced the working papers under reference, pointing out that joint venture arrangements as a method of operation for the Enterprise had been the subject of consideration by the Preparatory Commission at various times since 1983.

3. It was pointed out that in 1971, when the Latin American Group introduced its 13-power draft to deal with the international seabed area, the joint venture option was felt to be the only option for exploration, exploitation

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and processing. There seems to be at the current stage general acceptance of the joint venture option as the preferred option for the Enterprise in its initial operations. It is the accepted view that the joint venture option offers clear advantages with respect to the transfer of technology, training of personnel, finance, and processing and marketing.

4. In conducting its work, the Special Commission decided to undertake a section-by-section reading of the two documents, which has helped to focus attention on the joint venture option without detracting from other operational options. It decided further to provide annotations, as appropriate, both to the sections contained in LOS/PCN/SCN.2/WP.18 and to the explanatory memorandum.

5. With regard to the explanatory memorandum in the working paper, the view was expressed that a decision with respect to the joint venture option would depend on how the following points were addressed:

(i) The form the joint venture would take, that is, contractual or incorporated;

(ii) The ratio of capital participation of the joint venture partners. In the case of the Enterprise, it was noted that this would depend on the rate of contributions of countries that had ratified the Convention;

(iii) The need to ensure that the decision-making mechanism within the joint venture recognized the Enterprise's right to have a say in its affairs;

(iv) Transfer of technology (section 8 of the working paper);

(v) Training (section 9);

(vi) The manner in which conflicts would be resolved between the partners (section 21).

6. With regard to the type of joint venture arrangement used as a model in the working paper, i.e., the incorporated rather than the contractual, questions were raised as to why the former model had been chosen when the explanatory memorandum had indicated the advantages of the contractual joint venture. It was noted that the basic intentions of the two parties would be reflected in the provisions of either the contractual or the incorporated joint venture and that the difference would be in the modality of implementation.

7. It was suggested that on the very first page of the model contract, after each party, the words "represented by" should be added since it was usual practice to add a reference to the person who had signed the contract. It was also suggested that the definition of the Enterprise in the first preambular paragraph was restrictive when compared to the definition provided in

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annex IV, article 1. It was stated that since the Enterprise not only operated in the Area but also carried out other functions, there was a need to elaborate on the scope of its activities.

8. With respect to section 1, Definitions, the view was expressed that if a definition had been given for the Authority then a definition should be given for the Enterprise. In this connection, it was suggested that the preambular paragraph referred to above should only state what the activity was, and that if a definition was included in section 1 it would need to conform to annex IV, article 1. Another view was that the Enterprise was a moral person of the contract and as a result did not need to be defined. The view was held that there might be a need to define the Participant. Finally, it was stated that it was usual practice to describe the contracting parties and not to define them. It appears, however, to be generally accepted that a definition is not necessary as long as the contracting parties are described within the contract.

9. The definition of applicable law in section 1 and provisions regarding it as contained in section 22 of the model contract resulted in considerable discussions. It was suggested that it would be necessary to de-link section 1.2 from section 22 so that applicable law could be defined as the law to be applied to the contract. It was also agreed to separate sections 22.1 and 22.2 since the former dealt with the applicable law which would govern the contract and the latter with enforcement of the law. Concern was expressed with section 22.2 and the inability of the Enterprise to enforce a decision against a partner who was not a Party to the Convention. It was noted that since there could not be a contract unless the entity, whether public of private, was sponsored by a Party to the Convention, the legal provisions in annex III, article 21 (1), must be built into the contract between the parties. It was also pointed out that it was necessary to distinguish between the substantive and the procedural laws of the country of the contract, and that the applicable substantive laws were those to be applied and implemented when decisions needed to be enforced.

10. With regard to section 2, Scope, it was held that there was a gap in section 2.2. This arose because the working paper addressed itself solely to the assets of the joint venture and did not consider the issue of intellectual property and the ownership of patents which were involved in the transfer of technology in such a high-technology joint venture. It was noted that an essential component of any high-technology joint venture was research and development, and if the Enterprise were to be competitive in the marketplace additional attention should be directed to the matter in the model contract.

11. With regard to section 2.4, it was pointed out that this did not constitute usual practice. Usually, the company was managed by the party which held at least 51 per cent of the shares of the company. Another view was that since the choice of the manager was dependent on the level of competence, sometimes the minor participant could be the manager. The view was expressed that the wording of section 2.4 might make the switch, for the Enterprise to become the manager mandatory. It was suggested further that the

provision be reworded to allow for this flexibility. It was also noted that the provision should provide for the possibility of a third party becoming the manager of the company.

12. Regarding section 3, Term, the view was held that its language could be made clearer. It was pointed out that in the French text the contract would be in effect from the date of its conclusion, while usual practice was to state that the contract would enter into force on the date of signature. It was suggested that the article needed to stipulate that the contract would be terminated in the event of unusual circumstances such as bankruptcy. Another view was that this concern was covered by the provisions of section 17 (c) which dealt with unusual circumstances.

13. In respect of section 4, Responsibilities of the Participant, it was suggested that the list of the Participant's responsibilities was not exhaustive and that the Participant needed to present reports on production and other activities, and to report to the Board of Directors. In this regard, it was noted that while in section 5 (e) provision was made for the Enterprise to cooperate with the Participant in carrying out the training programme there was no corresponding provision in section 4 obliging the Participant to train people for the Enterprise. Similarly, it was noted that while the obligation of the Participant to transfer technology was provided for in section 8, that obligation was not reflected in section 4.

14. Another view was that it was not necessary to add these obligations to section 4. A number of drafting proposals were made. It was suggested that section (a) be redrafted to read as follows:

> "Until the Enterprise assumes such responsibility the Participant shall carry out activities under this contract as manager of the Joint Venture Company in accordance with section 2.4",

and that section 4 (b) be redrafted as follows:

> "The Participant shall thereafter cooperate with the Enterprise so as to facilitate performance by the Enterprise of its responsibilities as the manager of the Joint Venture Company."

It was also suggested that a new section 4 (c) be added to read:

> "The Participant shall provide training for the Enterprise."

15. With respect to section 6, The Joint Venture Company, a number of views were expressed. With regard to section 6.1 the view was put forward that the term "headquarters" in different legal systems could be interpreted in a number of ways. It was suggested that the provision be amended to read "*siège sociale*" and headquarters. It was pointed out that in English commercial law the term "headquarters" was the principal place of business of the company. Regarding section 6.2, the view was expressed that it was necessary to elucidate all the details on the Articles of Association and the

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Memorandum of the Joint Venture Company. The need to specify the currency in which the capital of the Joint Venture Company would be paid was indicated in section 6.3. It was pointed out that since the Joint Venture could be for exploration and/or exploitation and that while the capital input of the two parties might be the same in the beginning, it would be different once exploitation commenced, because the Enterprise's equity would be an explored site. It was also suggested that since WP.18 was only a model contract, this type of specificity was not required.

16. Misgivings were expressed in relation to section 6.6. The point was made that the provision could result in the party providing the loan, mortgaging the collective loan capital of the company and thus hampering its work. It was stated in this connection that since the loan would have to be secured, a mortgage problem would indeed arise.

17. Regarding section 6.7, it was suggested that it would be necessary to specify the minimum number of the members of the Board of Directors and the number that constituted a quorum. The point was made that the section needed to specify how a decision would be taken if the number of votes on either side of an issue were equal, and whether or not the chairman of the Board of Directors would have a casting vote.

18. Regarding section 6.9, it was stated that section 6.9 (b) was ambiguous and that either it should be deleted or it should specify what activities were prohibited. In relation to section 6.10, it was felt that the majority required for substantive issues should be more than a simple majority and that it should be left to the parties to decide on the actual percentages.

19. In the discussions on section 7, Ownership of property, the view was expressed that it was usual practice for the assets of the company to be divided according to the number of shares held by each party. Under this view, upon termination of the contract, debts would first be recovered and the remainder of the assets shared in proportion to the shareholding. Another view was that since the assets would have been fully recovered as development or operating costs, these assets became the property of the Enterprise.

20. With respect to section 8, Availability of technology, the view was expressed that upon termination of the contract the technology should be transferred to the Joint Venture Company.

21. Regarding section 9, Training, it was stated that if the word "staff" referred to the staff of the Enterprise, then the cost of training should not be borne by the Joint Venture Company. On the other hand, if it referred to staff of the Joint Venture Company, then the cost of training should be borne by the company. It was stated that training should not be an obligation and that these matters should be freely negotiated between the Enterprise and the Participant, as equal partners in the joint venture. The attention of the Special Commission was drawn to resolution II, paragraph 12 (a) (ii); article 144 (2) (b); and annex III, article 15, as provisions that made training by the Participant obligatory. It was pointed out that

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paragraph 12 (a) (ii) of resolution II was applicable only in the preparatory phase and that when the Convention entered into force and effect it would no longer be applicable.

22. In relation to section 10, Procurement of goods and services, it was suggested that all tenders be internationally advertised, thus avoiding hidden solicitations and inducements by suppliers and contractors.

23. With respect to section 13, Reports, it was pointed out that the problem of ownership had not been properly addressed in the section. It was also pointed out that the question of management should be addressed in section 2, Scope.

24. It was suggested that in section 14, Examination and inspection, and in particular in 14.1, the following words should be added to the text: "... and in accordance with generally recognized accounting principles and procedures".

25. Regarding section 15, Assignment and transfer, the view was expressed that the commentary did not provide that the other party should have the preferential right to purchase the share which the party wished to give up. It was suggested that the provision in 15 (a) needed to be brought in line with section 15 (b) to the effect that no assignment or transfer could take place without the prior consent of the other party in writing. Another view was that the right of first refusal also meant the right of pre-emption, and that it was a preferential right or right of pre-emption. A proposal was made to redraft section 15 (b) to provide clarity. In the proposal, section 15 (b) is to read as follows:

> "[The Enterprise and the Participant shall each] have the right to sell, assign, transfer, convey or otherwise dispose of any of its equity shares in the Joint Venture Company to the other Party or to any third party with the prior consent of the other party, which consent shall not be unreasonably withheld."

26. With regard to section 16, Force majeure, following a debate as to whether to enumerate the conditions which constituted force majeure and whether to include the word "foresee" in section 16.1 before the word prevent, it was decided to maintain section 16.1 as is and return to the question on the second reading of the working paper. It was noted that the wording of the clause was one that was used internationally and might derive from International Chamber of Commerce publication No. 421.

27. The question of whether material breach as contained in section 17.1 (b) should be substituted for by fundamental breach in section 17, Termination, was deferred until the second reading of the working paper. Regarding the question of whether the contract could be terminated in case of force majeure, a proposal was made to add a new subsection (d) to section 17.1, to read as follows:

> "if an event of force majeure has occurred and has lasted uninterrupted for a period of ... months".

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28. It was suggested that section 17.2 might need to be improved. It was noted that it provided for termination of the contract, but that under section 17.1 (c) termination was also available in the event of bankruptcy. It was pointed out that the intention of section 17.2 was that where the contract was terminated under section 17.1 it did not have the effect of cancelling those obligations of the parties that had already arisen. It was suggested that section 17.2 should have been written in the negative rather than the positive sense so that the effect of termination does not negate obligations. The observation was made that if a party to the joint venture became bankrupt the reason for its inability to honour its obligations would be bankruptcy and not the termination of the contract. It was proposed that section 17.2 be redrafted to read as follows:

> "Termination of this contract pursuant to this section shall not operate to discharge, terminate or extinguish rights and obligations which have already arisen under the terms of this contract."

29. It was also noted that since the model contract only applies to the relations between the Enterprise and the Participant, the provision in section 17.2 could not be applied to third parties. It was decided that this point would be reflected in an annotation to section 17.

30. With regard to section 18, Waiver, it was noted that the provision sought to preserve the right of the parties if it became necessary to do so. If a party sat on its right then this could not be interpreted as a waiver of its rights. The view was expressed that the provision in section 18.1 was too flexible in that the waiver seemed to be given in perpetuity.

31. The view was expressed that in section 20, Revision, 20.1 and 20.2 should be joined into a single paragraph. Another view was that the provision would become a little cumbersome if the two paragraphs were combined. An observation was made regarding the word inequitable in section 20.1. It was stated that the notion of inequitability was subjective, and that as subjective as it might be, either party might plead inequitability. The view was expressed that inequitability was not a sufficient reason to revise a contract and that a contract should not be revised only because one party had failed to advance in the way it had expected to. It was also suggested that the circumstances mentioned in section 20.1 would have to be extraordinary and unexpected circumstances in order to justify a renegotiation of the contract.

32. In relation to section 21, Disputes, it was suggested that before resort to arbitration it was necessary to resort to the procedures mentioned in Article 33 of the Charter of the United Nations, i.e., negotiation, enquiry, mediation and conciliation. It was requested that the text of section 21 be amended to include this point.

33. With respect to section 22, Applicable law, it was decided that it should be redrafted to reflect the usual practice. It was pointed out that the commentary in WP.18/Add.1 had indicated that section 22 had been based on annex III, article 21 (1). Annex III deals with a special kind of contract,

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i.e., the contract between the Authority and the contractor. It was noted that in the working paper one was dealing with a joint venture contract between the Participant and the Enterprise. There would be two contracts, one between the Authority and the Enterprise for a plan of work and the second between the Enterprise and the entity which joined in a joint venture. Since article 21 (1) of annex III does not deal with the same subject-matter, it was felt that following that provision would straitjacket the Enterprise.

Transitional arrangements for the Enterprise

34. During the current session consultations were held between the Coordinator of the Contact Group of the Group of 77 on Special Commission 2 Matters and the Coordinator of the Group of Six with regard to recommending a single option for the status and structure of the institutional arrangement during the transitional period as contained in the Chairman's paper, LOS/PCN/SCN.2/1990/CRP.5 and Add.2.

35. In his report to the plenary of Special Commission 2, the Coordinator of the Group of Six reiterated the importance the Group of Six attached to the establishment of a nucleus Enterprise during the pre-operational stage. He pointed out that although consultations had taken place during the current session there had not been sufficient time to arrive at a compromise single option. He requested that the Special Commission give him and the Coordinator of the Contact Group of the Group of 77 on Special Commission 2 Matters additional time both intersessionally and at the tenth session to continue their dialogue.

36. The Coordinator of the Contact Group of the Group of 77 on Special Commission 2 Matters drew the attention of the Special Commission to an error in CRP.5/Add.2. In option 3 of the paper, he requested that the words "from the Authority" be deleted since they were not part of the Group of 77's position. On the consultations with the Coordinator of the Group of Six on the compromise text regarding a single option for the status and structure of the institutional arrangement during the transitional period, he reiterated the Group of 77's desire to arrive at such a compromise text. He noted, however, that while the Group of 77 had been making concessions, the Group of Six had not been forthcoming with any concessions of their own. He stated the Group of 77's position that a compromise text should remain faithful to the provisions of the Convention.

Assumptions

37. The Chairman's Advisory Group on Assumptions reviewed the current price movements in the four metals (nickel, copper, cobalt and manganese) and continued to study the paper, which compares some of the main parameters of the Australian study and the study done by French experts of IFREMER.

38. On the basis of information presented by the Australian expert and statistics compiled by the Secretariat, the Group observed that there had been minor fluctuations in nickel prices during 1990-1991. According to nickel

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industry experts, new production capacities are now coming on stream and this may result in an oversupply of nickel. It is therefore anticipated that nickel prices will remain relatively low in 1991-1992. Copper prices were volatile during 1990-1991. Copper output is expected to increase but consumption is forecast to be lower this year compared to 1990, and this will exert downward pressure on copper prices. The manganese market remains tight and this may encourage new developments. The outlook for manganese is for a continuation of strong demand, and prices are also likely to remain strong. An increase in the demand for cobalt has been predicted for the 1990s. Although supply problems may occur, cobalt prices are forecast to remain firm.

39. The Group examined the paper submitted by the delegation of Australia (LOS/PCN/SCN.2/WP.10 and Add.1) which compares some of the main parameters of the Australian study on the economic viability of deep seabed mining and with those contained in the study done by French experts of IFREMER, under contract to the Commission of the European Communities (CEC). The Australian study was based on the premise that a deep seabed mining project would have an annual production rate of 3 million tons of dry nodules per year while the French study contemplates an annual production rate of 1.5 million tons per year. To enable a more accurate comparison, both sets of figures relating to discounted cash flow rate of return (DCFROR) were derived using the United States Bureau of Mines mine simulation (MINSIM) programme.

40. After an examination of the French study the Group concluded that a project with an annual production capacity of 1.5 million tons of dry nodules might be economically attractive. DCFROR obtained was estimated to be about 10 per cent after taxes and payment to the International Seabed Authority. The primary reason for the positive DCFROR is the higher recovery of manganese (in both qualitative and percentage terms) using pyrometallurgical processing. In the French study, manganese contributes substantially to the project profitability. Other factors used in the French study contribute to making it more favourable than the Australian study. For example, unlike the Australian study, the French study assumes that much of the pre-production activities such as research and development have already been carried out and that their costs are external to the mining project.

41. The members of the Group noted that in order to arrive at a new set of basic assumptions it was necessary to continue to examine new developments related to the technical and economic studies on the viability of deep seabed mining which might be made available to the Group by other pioneer investors.

42. The Group placed on record its appreciation to the experts from Australia and the European Economic Community for their continued assistance in the work of the Group.

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Programme of work for the tenth session

43. The programme of work will be as follows:

(a) Harmonization and coordination of activities with respect to exploration and training prior to the entry into force of the Convention and in the period before seabed mining is about to begin;

(b) (i) Other matters arising from paragraph 12 of resolution II, including its subparagraphs (a) (i); (a) (iii); and (b), on which recommendations are needed to fulfil the mandate of Special Commission 2;

(ii) Any residual matters regarding the implementation of the Training Programme under paragraph 12 (a) (ii) of resolution II;

(c) Finalization of recommendations to the plenary of the Preparatory Commission on:

(i) Transitional arrangements for the Enterprise;

(ii) Annotations on the provisions of the Convention on the structure and organization of the Enterprise as contained in document LOS/PCN/SCN.2/L.8;

(d) Operational options:

(i) Joint ventures: annotations to WP.18 and Add.1;

(ii) Operational options seen within the context of the suggestions of the Chairman's Advisory Group on Assumptions.

44. The Special Commission having completed most of the tasks within its mandate is hoping to submit its final recommendations by the summer session of 1992.

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Tenth session
Kingston, Jamaica
24 February - 13 March 1992

STATEMENT TO THE PLENARY BY THE ACTING CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held 8 meetings at the current session. One of its scheduled meetings was allocated to the Contact Group of 77 on Special Commission 2 Matters and to the Chairman's Advisory Group on Assumptions. The programme of work for the session was contained in paragraph 43 of document LOS/PCN/L.95. Two meetings were devoted to a consideration of recommended annotations by Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise as contained in document LOS/PCN/SCN.2/L.8 and on the form that the final recommendation on the subject should take. One meeting was devoted to the consideration of the question of joint ventures, in particular the draft basic joint venture contract contained in documents LOS/PCN/SCN.2/WP.18 and Add.1 as well as the comments thereon as contained in the Statement of the Chairman of Special Commission 2 of the last session (LOS/PCN/L.95, paragraphs 2-33) and the form of the final recommendation on the subject of operational options. Another meeting was allocated to a discussion of the form of the draft final report to be submitted by the Special Commission to the Plenary for transmission to the Authority. Two meetings were devoted respectively, to a discussion of transitional arrangements for the Enterprise as contained in the Chairman's papers LOS/PCN/SCN.2/1990/CRP.5 and Addenda 1 and 2; and a discussion of the report of the Second Meeting of the Training Panel as well as the report of the Chairman's Advisory Group on Assumptions, which held one meeting at the current session. At its last meeting of the current session, the Special Commission considered the draft Chairman's report. Informal consultations were held between the Coordinator and some members of the Group of 77 on Special Commission 2 Matters and the Coordinator and some members of the Group of Six with regard to making a recommendation on the status and structure of the institutional arrangement during the transitional period.

Annotations on the provisions of the Convention relating to the structure and organization of the Enterprise

2. The Special Commission reviewed document LOS/PCN/SCN.2/L.8 which contains the recommendations of Special Commission 2 to the Plenary of the Preparatory Commission on the structure and organization of the Enterprise. The document incorporates the annotations which were made to working paper 16 (LOS/PCN/SCN.2/WP.16), entitled "Provisions of the Convention Relating to the

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Structure and Organization of the Enterprise" and recommends supplementary draft provisions to that working paper.

3. Following an article-by-article reading of L.8, the Special Commission decided to incorporate the following additional annotations into its draft final report to the Plenary:

(a) It was pointed out by one delegation that the functions contained in paragraph 1 (d)-(h) of article 4 (legal personality) should be deleted because they are details of a contract and are subject to contractual arrangements which are provided for in paragraph 1 (a).

(b) One delegation was of the view that, in conformity with article 5, paragraph 1 of Annex IV, paragraph 1 of article 10 (membership) should be followed by the provision contained in article 11.

(c) The reference to special interests in article 11 (equitable geographical distribution and the representation of special interests) continued to be a source of difficulty. Some delegations felt that there should be a definition of special interests. In this respect attention is drawn to the second sentence of article 161, paragraph 1 (d) of the Convention on the composition, procedure and voting of the Council which provides as follows: "The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States".

(d) On the question of the term of office of the members of the Governing Board (article 13), the view was expressed by one delegation that members of the Board should only be re-elected once so as to ensure a rotation of the membership. Others supported an arrangement which would ensure continuity in the membership, e.g. by re-electing one third of the members for a second term and rotating two thirds of the members. It was noted that this was the practice of most institutions.

(e) With respect to paragraph 3 of article 19 (the Director-General), one delegation held the view that the Director-General should serve no more than two terms.

(f) One delegation supported the incorporation of the provision contained in article 22 (international character of the Director-General and the staff) into article 20 (functions and duties of the Director-General) and article 21 (the staff of the Enterprise) so as to ensure that the Director-General and the staff shall not seek or receive instructions from any Government or from any other source external to the Enterprise.

(g) One delegation was of the view that the words "as such" in paragraph 1 of article 23 (confidentiality) required clarification. With respect to paragraph 2, it was noted by one delegation that the provision was not explicit enough to ensure that if a member of the Governing Board, the Director or a member of the staff of the Enterprise violated the confidentiality rule they would be dismissed immediately.

(h) It was noted by one delegation that the words "inter alia" should be added after the words "The Assembly shall" in article 24 (the Assembly), since in the future the Assembly may have other functions in relation to the Enterprise.

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(i) One delegation noted that paragraph (b) of article 26 (sources of funds) should not be restricted to voluntary contributions from States Parties but that the Enterprise would also be able to receive funds from multinational corporations. Another delegation felt that voluntary contributions could also come from appropriate non-governmental organizations.

(j) With respect to article 28 (financing of the first mine site and initial administrative expenses), some delegations stated that while the initial administrative expenses of the Enterprise should be as low as possible this should not hinder it from functioning at an optimal level. Another delegation felt that the hands of the Governing Board should not be tied.

(k) On the question of liability (article 33), it was emphasized by one delegation that the Enterprise and the Authority are independent legal entities with different responsibility and liability.

4. In addition to the above annotations, a statement was made by the Group of Six explaining why they wished to reserve their position on document L.8. The Group pointed out that contrary to the expectations held during the Third United Nations Conference on the Law of the Sea, the prospects for the commercial production of minerals from the deep seabed had receded into the next century. Therefore, there would be no deep seabed mining immediately after the entry into force of the Convention. There would instead be a longer period of yet undetermined length between the entry into force of the Convention and the time when deep seabed mining became economically viable. Furthermore, approaches to economic issues at national and international levels had undergone a considerable transformation in favour of market economy principles. Consequently there was a growing acceptance that the Enterprise should operate on purely commercial terms and that its first mining operation should be carried out as a joint venture together with other deep seabed mining companies. All these developments underscored that the provisions of the Convention relating to the Enterprise had been overtaken by events and therefore needed to be changed. Other developments affecting these provisions would occur probably during the interim period, i.e., between the entry into force of the Convention and the time that deep seabed mining became economically viable. It was, in the opinion of the Group of Six, premature to take any decision now regarding the detailed structure and organization of the Enterprise. That would of course be regulated when deep seabed mining became effectively possible and when one has a clear picture of the conditions under which deep seabed mining would be carried out. Consequently, the Group thought that it was inappropriate at this moment to annotate provisions of which one did not know whether and under which circumstances they would be applied.

5. The Special Commission agreed that document L.8 and the additional annotations which were made thereto would form part of the draft final report of the Special Commission to the Plenary for transmission to the Authority.

Operational options: joint ventures

6. The Special Commission decided that it was ready to submit its final recommendation on the subject of joint ventures, as one operational option for the Enterprise. This recommendation would include all the documents which have been presented to the Commission on the subject of joint ventures over the last years. With respect to the draft basic joint venture contract (LOS/PCN/SCN.2/WP.18 and Add.1), it was agreed that the comments which had been made thereon at the previous session as reflected in document LOS/PCN/L.95, paragraphs 2-33, would, with some modifications, be included as annotations. The modifications which were introduced at the current session were as follows:

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7. With respect to paragraphs 5 and 6 of L.95, it was noted that by concentrating the entire discussion on providing annotations to the various sections of a model for an incorporated joint venture contract and leaving out the contractual joint venture contract as an alternative arrangement, the report did not reflect the general opinion of the members of the Special Commission and also the views expressed in paragraphs 15, 16 and 19 of working paper 18. It was pointed out that this needed to be corrected in the final recommendation by highlighting the advantages of a contractual joint venture to those of an incorporated joint venture and by stating very clearly that the contractual joint venture is the more generally preferred form. In response to a suggestion that the Special Commission should study a separate model contract for the contractual joint venture which could be annotated in subsequent meetings of the Commission, it was pointed out that in paragraph 19 of working paper 18 it was noted that "The model could be readily adapted to a contractual joint venture by including the standard provisions which form part of the rules governing incorporated companies in national laws. Those provisions were not reproduced as they would only add bulk to the model without adding much to the principles of joint venture arrangements at the current stage".

8. It was also pointed out that the report of the Chairman should take into account the basic principles of Annex III, article 11 of the Convention which envisages joint ventures between the contractor and the Authority and also the fact that contractual arrangements can be entered into only between entities sponsored by a party to the Convention. Matters relating to transfer of technology and training needs woud also form the essential elements of any contractual arrangement that may be entered into between the Authority and the contractor or the operator.

9. With respect to paragraph 10 of L.95, it was re-emphasized that research and development was an essential component of such high technology ventures and that one could not overstate the importance of this aspect especially during the early phases of the Enterprise when no exploration would take place. It was suggested that the words "research and development" should be included within the scope of the joint venture as this would advance the cause of the Enterprise.

10. The Group of Six in a general statement on the subject of joint ventures reaffirmed the statement which the Group had made at the resumed eighth session in New York. It was stated that the Group shared the general acceptance of the joint venture option as the preferred option for the Enterprise in its initial operations. The Group was of the opinion that this option offered a lot of advantages and that it may contribute to solving problems raised by some of the provisions of the Convention and its annexes. The Group had taken account of the fact that the provisions of joint venture agreements depend on the particular characteristics of the project and the objectives of each of the participants, as paragraph 11 of working paper 18 indicates. It had therefore decided that it is premature to decide on any clauses of a future joint venture agreement. At this stage, the Group was of the opinion that the model agreement could only serve illustrative purposes, as it was rightly stated in paragraph 8 of working paper 18. The Group of Six stressed that the model joint venture contract contained in documents WP.18 and Add.1 as well as the proposals presented in documents LOS/PCN/SCN.2/WP.4 and WP.5 could serve only as a source for partners in the joint venture when they devise a draft for such an agreement.

11. The Special Commission agreed that in the final recommendations on the subject of operational options with particular reference to joint ventures, its report would comprise the various documents which have been presented on the subject and the annotations thereon.

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Form of the draft final report

12. The Special Commission agreed that the draft final report to be submitted by Special Commission 2 to the Plenary for transmission to the Authority would contain a summary of the mandate of the Commission; a concise summary of the overall accomplishments of the Commission, as well as the relevant documentation. It was noted that the mandate of the Special Commission could be summarized as follows:

> "The Special Commission for the Enterprise, established by resolution I, paragraph 8 is entrusted with functions, the basic purpose of which are outlined in the preambular paragraph of resolution II. The responsibilities of the Special Commission, therefore, do not only concern the 'early into effective operation of the Enterprise', but also relate to the successful implementation of the scheme for pioneer investors.
>
> According to paragraph 8 of resolution I, the Special Commission for the Enterprise shall:
>
> (a) Take all measures necessary for the early entry into effective operation of the Enterprise; and,
>
> (b) Perform the functions referred to in paragraph 12 of resolution II.
>
> Resolution II contemplates that one of the main purposes of the scheme for pioneer investors is to ensure that on the entry into force of the Convention, the Enterprise 'will be provided with the funds, technology and expertise necessary to enable it to keep pace with States and other entities'.
>
> With the changed circumstances regarding the economic viability of seabed mining and estimates of its earliest commencement being placed at only in the next fifteen to twenty years, at the earliest, the work of the Special Commission has had to be modified to take into account these realities. In this context, the Special Commission undertook discussions on the following documents: (1) LOS/PCN/SCN.2/WP.16 - Provisions of the Convention relating to the structure and organization of the Enterprise and document LOS/PCN/SCN.2/L.8 containing annotations to those provisions; (2) LOS/PCN/SCN.2/1990/CRP.5 and Addenda 1 and 2 - Suggestions of the Chairman to facilitate discussions on transitional arrangements for the Enterprise; (3) LOS/PCN/SCN.2/WP.18 and Add.1 - Draft basic joint venture contract; and (4) LOS/PCN/SCN.2/L.6/Rev.1 - Draft principles, policies, guidelines and procedures for a Preparatory Commission Training Programme and document LOS/PCN/SCN.2/L.7 - Implementation of the Preparatory Commission Training Programme. Recommendations of Special Commission 2.
>
> A substantial part of the mandate of Special Commission 2, namely the implementation of resolution II, was negotiated outside the Commission. In fact, it was only the elaboration of a training programme which remained in its purview. In this regard, the Special Commission elaborated the principles, policies, guidelines and procedures governing the programme and recommended the modalities for its implementation including the establishment of a Training Panel, which were adopted by the Preparatory Commission. The Panel has been established and has met twice."

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Transitional Arrangements for the Enterprise

13. During the current session in an effort to bring the debate on the status and structure of the institutional arrangement during the transitional period as contained in LOS/PCN/SCN2/1990/CRP.5 and Add.2 to a conclusion, the Acting Chairman convened informal consultations between the representatives of the Group of 77 and the Group of Six. While both groups could not agree on the status and structure of the institutional arrangement, there was general agreement on the functions to be performed and on the need for an evolutionary approach where the functions of the Enterprise are filled and carried out according to the dictates of the prevailing circumstances.

14. In his report to the plenary of Special Commission 2, the Coordinator of the Group of Six stated that it was clear to the Group that an independent Enterprise could not yet be established. As for the initial status and structure of the Enterprise during the transitional period, the Group of Six stated its preference for an arrangement whereby the Governing Board would be substituted for by the Assembly and the Council and the Director-General by an interim coordinator. The election of the members of the Governing Board and the Director-General of the Enterprise would only take place when commercial operations became feasible. The interim coordinator would be assisted by experts who would be part of the Secretariat. Together, they would perform the functions described in Part II of CRP.5 and such other functions entrusted to them by the Council. The number of experts could be increased by decisions of the competent organs of the Authority in accordance with the volume of their work. The remuneration of the interim coordinator and the experts would be paid out of the administrative budget of the Authority. On the basis of developments in the deep seabed mining sector, the Council and the Assembly would decide when to set up the Enterprise and to elect the Governing Board and the Director-General.

15. The Coordinator of the Contact Group of the Group of 77 on Special Commission 2 matters reported on the preference of the Group of 77 for the initial status and structure of the Enterprise during the transitional period. There would be a small interim Governing Board and an interim Director-General. The policies of the Enterprise would reflect its autonomy and the state of affairs with respect to the prospects for seabed mining. The interim Director-General would be assisted by a small group of experts drawn from the secretariat. The interim Director-General and the experts would carry out the functions as contained in Part II of CRP.5. The number of experts could be increased according to the volume of work and the remuneration of the interim Director-General and experts would be paid out of the administrative budget of the Authority. The Assembly and Council would decide when to establish the fully-fledged Enterprise, enlarge the Governing Board and thus establish the Enterprise.

16. To assist the Special Commission to conclude its debate on this issue and be in a position to make a recommendation to the Assembly, the Acting Chairman of the Special Commission proposed a method for communicating the conclusions of the Special Commission. At the 135th meeting of the Special Commission, the Acting Chairman summarized as follows:

> Pursuant to its mandate, Special Commission 2 had devoted considerable effort in grappling with this issue. Most recently, this has occurred in CRP.5 and Addenda 1 and 2, which have been debated both formally and informally. What has emerged from these discussions is a widely held view that, in light of the prolonged delay in the development of deep seabed mining activities, it is unlikely that the Enterprise would be able to undertake operational activities for quite some time. Therefore, in the initial phase what will likely be needed is some initial

institutional arrangement which could be activated as circumstances dictate. At the same time, it was recognized that the operations of the Enterprise should be based on sound commercial principles and that it should be autonomous and free from political domination.

Just as the drafters of the Convention were unable successfully to forecast when commercially viable seabed mining would commence, we should also avoid a similar peril and not, at the present time, attempt to devise concrete operational structures for the Enterprise in the interim period. Let us remember that our task in Special Commission 2 is to provide our best advice, based on all available information, to the Assembly on how to deal with these unforeseen circumstances.

The proposal, therefore, is that the Special Commission advise the Assembly to proceed on the basis of an evolutionary approach where the functions of the Enterprise, laid down in the Convention for its efficient operation, are filled and carried out according to the dictates of the prevailing circumstances. We could go as far as to say that the functions enumerated in Part II of CRP.5 represent our best judgement on the activities to be undertaken by the Enterprise in this interim period.

The Assembly will have to judge the best way in which these and any other functions are to be carried out and the functional mechanisms and initial status and structure of the Enterprise during the transitional period. Moreover, it should also be kept in mind that there is a general view on the need to minimize the costs to State Parties while at the same time safeguarding both the effective operation of the Enterprise and its ability to evolve in an orderly fashion, as circumstances dictate, into a viable participant in deep seabed mining.

17. In response to the above statement, the Coordinator of the Group of Six stated that the suggestion of the Acting Chairman was acceptable to the Group of Six on the understanding that when the Assembly took a decision, it would only be by consensus. The Coordinator of the Contact Group of the Group of 77 on Special Commission 2 matters stated that the Group of 77 could agree to the Acting Chairman's approach subject to the condition that the structure proposed is understood to be for the pre-commercial phase and that when the Assembly decides to enlarge the Enterprise, its decision would be taken according to the modalities set forth in the Convention.

Training Panel

18. The Coordinator of the Training Panel reported on the results of the Second Meeting of the Training Panel which met from 25-28 February 1992. He reported that the Panel had approved the revised training programme of Japan and a draft note verbale announcing the training programme of Japan and France. The Coordinator of the Panel also reported that the training programme of France would start in November 1992. It was reported that at its second meeting the Training Panel was informed by the representative of Germany that his Government had the intention of offering traineeships that are comparable to those offered by the registered pioneer investors at the summer session. The complete report of the Training Panel is contained in document LOS/PCN/BUR/R.15.

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Harmonization and coordination of activities with respect to exploration and training prior to the entry into force of the Convention and in the period before seabed mining is about to begin

19. The Acting Chairman stated that the remaining part of the mandate of Special Commission 2 under resolution II, the Training Panel, which is an ongoing exercise under the pioneer investor regime should be done along with the rest of the monitoring and consideration of that regime, in the General Committee and Plenary. As for the harmonization of the training function and the exploration function being carried out under the pioneer investor regime, this should be accomplished under the institutional arrangement that could be set up, as circumstances dictate, in the interim period.

Assumptions

20. The Chairman's Advisory Group on Assumptions held only one meeting at this session and devoted its discussions to the scope, substance and form of the final report on the activities of the Group.

21. The Chairman's Advisory Group on Assumptions was established in 1986 with a mandate entrusted to it by Special Commission 2 to monitor the economic conditions for seabed mining so that it could advise the Special Commission on when it might be possible to revise the current model of the Preparatory Commission for seabed mining contained in the Australian study LOS/PCN/SCN.2/WP.10 and Add.1, and also to monitor the price movements in the four metals (nickel, copper, cobalt and managese).

22. Working Paper 10 examines the potential viability of a fully integrated independent Enterprise operation by comparison with the same scale of operation by an hypothetical Australian company. It does not deal with the effects of different operational options on viability. The general conclusion of the study is that seabed mining will prove to be economically viable when metal prices improve and/or when capital and operating costs can be reduced with the introduction of highly efficient technologies.

23. The Group was called upon to consider when better perspectives could be introduced into the Australian study. It was asked to explore the possibility of introducing new assumptions on the size of production, the number of metals extracted, and the capital and operating costs into the model. In this connection it was stated that "continuing search for agreement on assumptions is without prejudice to the most basic assumption of all, which is that the Enterprise would not mine until it is economically feasible for it to do so".

24. During the course of its meetings that were held at the sessions of the Preparatory Commission, the Group examined new developments in metal markets and movements in metal prices in respect of nickel, copper, cobalt and manganese. It also reviewed the short, medium and long-term forecasts for the production, consumption and prices of the four metals.

25. The Group has monitored the information on new technological developments in seabed mining and processing which might justify changing the capital and operating costs used in the current deep seabed model.

26. Last but not least, the Group examined another paper submitted at the request of the Group by the delegation of Australia which compared some of the main parameters of the Australian study (WP.10 and Add.1) with those contained in the study done by French experts of IFREMER, under contract with the European Economic Community. The French study is based on the results of a four-year programme outlined in the 1989 Offshore Technology Conference Proceedings. In order to have comparable sets of figures, the discounted cash flow rate of return (DCFROR) for the French study was derived using the same

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basis as was used for the Australian study, i.e., the United States Bureau of Mines mine simulation programme.

27. It should be noted that the French study attracted the attention of the Group because a number of basic assumptions used in the French study are different from those that are used in the Australian one. The French study is based on the premise that a deep seabed mining project will have an annual production capacity of 1.5 million tons of dry nodules per year and that a pyrometallurgical processing rate would be utilized to enable a higher recovery of manganese. The results of the Group's examination of the French study were presented at the last session in New York.

28. The Group agreed that because of the relatively short notice it obtained, it was not possible for the Group to present its final report at the current session. The Group is of the opinion that its final report will have to be supplemented by substantive information which it collected and examined, to enable the Special Commission to examine this information itself and draw its own conclusions. Since most of the conclusions made by the Group have been reflected in previous reports, these will be presented in the final report.

29. At the same time the Group feels that it is necessary to emphasize that the work of the Group needs continuity. In this connection the Group suggests that during the period before entry into force of the Convention, its successor should concentrate, inter alia, on periodic analysis of world markets and metal prices, their trends and forecasts; collection of information on and evaluation of technological developments; assessment of the state of knowledge of deep-sea environments and possible impacts of seabed mining activities.

30. The Coordinator expressed his appreciation to all his colleagues from the Group for their help and support and in particular to the experts from Australia and EEC and to the Secretary of the Group for their substantial input.

Programme of work for the summer session

31. The Special Commission will review its draft final report for submission to the Plenary of the Preparatory Commission.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL
TRIBUNAL FOR THE LAW OF THE SEA
New York, 10-21 August 1992

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held three meetings at the tenth resumed session. At the end of the tenth session at Kingston, the Special Commission had established a programme of work for its current session. That programme of work, contained in paragraph 31 of document LOS/PCN/L.100, "Statement to the Plenary by the Acting Chairman of Special Commission 2 on the progress of work in that Commission", consisted of reviewing its draft final report which would be submitted to the Plenary of the Preparatory Commission.

2. At the 137th meeting of the Special Commission, the Chairman of the Commission recalled the Special Commission's decision to review its draft final report at this session and the format it had requested for the report as contained in paragraph 12 of document LOS/PCN/L.100.

3. He noted that this format called for the report to present "a summary of the mandate of the Commission, a concise summary of the overall accomplishments of the Commission, as well as the relevant documentation". He also noted that the report had correctly stated that with the changed circumstances regarding the economic viability of seabed mining, the work of the Special Commission has had to be modified to take into account those realities.

4. In this context, the Special Commission's discussions had focused on working papers and documents relating to:

(i) Provisions of the Convention relating to the structure and organization of the Enterprise, and annotations thereto;

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(ii) Suggestions of the Chairman to facilitate discussions on transitional arrangements for the Enterprise;

(iii) Joint ventures as the operational option for the Enterprise in its initial operation;

(iv) The Preparatory Commission training programme.

5. The Chairman of Special Commission 2 expressed his appreciation to the Acting Chairman of the Special Commission during the tenth session at Kingston for the compromise solution he had arrived at, with regard to the issue of the status and structure of the institutional arrangement for the Enterprise during the pre-operational period (part III of LOS/PCN/SCN.2/1990/CRP.5, as well as LOS/PCN/SCN.2/1991/CRP.5/Add.2), as contained in paragraphs 13-17 of document LOS/PCN/L.100. He pointed out, however, that throughout the Special Commission's debate on the subject of transitional arrangements, the other related issues such as the purpose of the transitional arrangements and functions to be performed during this period had been resolved by consensus. He inquired of the Special Commission whether, with the time to ruminate during the inter-sessional period, further discussions on the status and structure of the institutional arrangement would lead to a consensus.

6. It was stated by the Acting Chairman during the tenth session that while LOS/PCN/L.100 reflected the situation at the time, it would be for the Coordinators of the Group of Six and the Group of 77 to meet and to decide if such a possibility existed. The Coordinator of the Group of Six noted that while the Group was satisfied with the compromise solution as contained in LOS/PCN/L.100, it would be willing to meet with the Coordinator of the Group of 77 if that Group had other proposals. The Coordinator of the Group of 77 reported that the contact group of the Group of 77 would meet on this matter. No report has been made to the Special Commission as to whether the two Coordinators have met and arrived at a consensus on the issue of the status and structure of the transitional arrangement for the Enterprise.

7. The Special Commission was unable to discuss its draft provisional final report (LOS/PCN/SCN.2/1992/CRP.6) because it was not available in the working languages of the United Nations, other than English. The Commission, however, heard the final report of the Chairman's Advisory Group on Asssumptions.

8. Since that report was also not available in the working languages of the United Nations, other than English, it could not be submitted to the Special Commission for its consideration. It was pointed out that the document was included in the Commission's draft final report and could be discussed at the eleventh session.

9. In his introduction to the final report of the Chairman's Advisory Group on Assumptions, its Coordinator, Mr. Luis Preval of Cuba, stated that its conclusion was as follows:

> "In conclusion, the Group was of the view that there was a need for continuity in its work suggesting that its successors, during the period before the entry into force of the Convention, should concentrate, *inter alia*, on periodic analysis of world markets and metal prices, their trends and forecasts; collection of information on and evaluation of technological developments; and assessment of the state of knowledge of deep sea environments and possible impacts of mining activities. In this connection the Group believed that the Secretariat could take up these activities for the time being.
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> "The Australian delegation advised that an updated version of its study on the economic viability of deep seabed mining (LOS/PCN/SCN.2/WP.10) incorporating escalated dollar values would be available before the end of the year."

Programme of work for the eleventh session

10. As the Special Commission was unable to consider its draft final report at this session, it will undertake this task at the eleventh session. This will also include a review of the draft final report of the Chairman's Advisory Group on Assumptions.

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PREPARATORY COMMISSION FOR THE INTERNATIONAL SEABED AUTHORITY AND FOR THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Kingston, 22 March - 2 April 1992

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE CONCLUSION OF THE WORK OF THE SPECIAL COMMISSION

1. Special Commission 2 held four meetings at the eleventh session. At the end of the tenth resumed session in New York, the Special Commission had established a programme of work for its current session. That programme of work, contained in paragraph 10 of document LOS/PCN/L.105, "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", consisted of reviewing its draft final report.

2. At the 140th meeting of the Special Commission, the Chairman of the Commission recalled the Special Commission's decision to review its draft provisional final report as contained in document LOS/PCN/SCN.2/1992/CRP.6 at this session and to conclude its work. The Chairman of the Commission stated the importance he attached to the draft provisional final report reflecting as accurately as possible the discussions that had taken place in the Commission over the years. He noted that in the absence of summary records of the meetings of the Special Commission, the statement to the Plenary by the Chairman of the Commission at the end of each session over the years, had reflected as accurately as possible what had transpired in the work of the Commission. While informing the Commission that it had been scheduled to hold five meetings at this session, he pointed out that since the Chairman of the Preparatory Commission had requested that the Statement to the Plenary on the progress of work in the various Special Commissions by their respective chairmen be submitted by Wednesday 31 March 1993, the Special Commission really only had four substantive meetings to conclude its consideration of LOS/PCN/SCN.2/1992/CRP.6 - "Draft Provisional Final Report of Special Commission 2".

3. He stated the procedure outlined by the Chairman of the Preparatory Commission to facilitate consideration of the draft provisional final report in each of the Commissions to enable them to conclude their work at this session. He pointed out that while the procedure did not allow for the renegotiation of issues that had been considered in the course of the Special Commission's work it allowed delegations to comment on the draft provisional final report with regard to its accuracy and its reflection of the various points of view that had been expressed on these issues. He further pointed

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out that in the procedure outlined by the Chairman of the Preparatory Commission, proposed amendments to LOS/PCN/SCN.2/1992/CRP.6 could only be reflected in that report if the proposed amendments were agreeable to all of the members of the Special Commission. Comments or proposed amendments that were not agreeable to all of the members of the Special Commission would be included in his statement to the Plenary on the progress of work in Special Commission 2 at this, the eleventh session.

4. The view was expressed that a minority position of a group of delegations, a position that did not enjoy consensus, would under this procedure, not be reflected and that the Chairman of the Commission should still take into account such minority positions. The Chairman of Special Commission 2 stated that all views would be reflected in the final report in a balanced way, even the views of an important minority group whether or not these views were shared by all members.

5. The Chairman of the Commission began the discussions on LOS/PCN/SCN.2/1992/CRP.6 by inviting general comments on the document followed by specific comments and/or proposed amendments on a section-by-section, chapter-by-chapter or issue-by-issue basis.

a. General comments on LOS/PCN/SCN.2/1992/CRP.6

6. Available to all members of the Commission were documents LOS/PCN/SCN.2/1993/CRP.7 of 28 January 1993 - "Comments submitted by the European Community and its member states on the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6)" and LOS/PCN/SCN.2/1993/CRP.8 of 28 January 1993 - "Suggested amendments to the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6)" - submitted by the delegations of Belgium, Germany, Italy, Japan, the Netherlands and the United Kingdom and Northern Ireland.

7. In his statement to the Special Commission in response to a question raised by the Co-ordinator of the Contact Group for the Group of 77 regarding the serious reservations that the European Community and its member states had with the draft final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6) as contained in LOS/PCN/SCN.2/1993/CRP.7, the representative of the European Community read the following statement:

"The European Community and its Member States have stated in their paper CRP.7 that the provisional final report of Special Commission does not reflect the state of discussions in that Commission. Further they consider that the report is not sufficiently balanced. This can be illustrated with the following examples:

The report does not reflect adequately the state of discussion on the transitional arrangements for the Enterprise.

In effect it does not contain with sufficient details the observations made by several delegations on the necessity to foresee a pre-operational period and, as a result, to provide for institutional arrangements for this period.

It does not contain the recommendation agreed in Kingston in 1992 on the initial institution arrangements. This recommendation appears only in the annotation reproduced in CRP.5/Rev.1 pages 9 and 10.

The report does not reflect the opinion of several delegations on the question of the structure and organization of the Enterprise after the initial phase and it does not contain the observation that the Enterprise should operate on purely commercial terms".

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8. With regard to document LOS/PCN/SCN.2/1993/CRP.8 which contained suggested amendments to the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6), the Co-ordinator of the Group of 6 in Special Commission 2 stated that the suggested amendments came from the Group of 6 since it was that group and not the European Community and its members states that more closely followed the work of Special Commission 2. He pointed out that in the Group's view, LOS/PCN/SCN.2/1992/CRP.6 was a bit short in its presentation of the various issues that arose in the consideration of its mandate. He pointed out that while the group was not stating that the contents of the report were not factual, other things happened that if properly reflected in the report would more fully reflect the position of the Group of 6. As an example, he stated the group's support for an evolutionary approach to the Enterprise wherein at the beginning, the Enterprise is part of the Authority, a small office which works under the protection of the Authority and is part of the Authority, expanding as prospects for seabed mining improve. The Group of 6 was of the view that LOS/PCN/SCN.2/1992/CRP.6 did not reflect the kind of agreement reached in this regard, but seemed to imply agreement on the organization or institutional arrangement of the Enterprise. LOS/PCN/SCN.2/1993/CRP.8 contained suggested amendments to the text of LOS/PCN/SCN.2/1992/CRP.6 to take better account of the position of the Group of 6.

9. The view was expressed that LOS/PCN/SCN.2/1992/CRP.6 is clearly structured in the form in which it was required to be presented to the Commission as provided for in paragraph 3 of LOS/PCN/L.105 of 19 August 1992 "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission". Another view was that the report being considered (LOS/PCN/SCN.2/1992/CRP.6) accurately reflects the discussions in the Commission.

10. A further view expressed by the Co-ordinator of the Contact Group of the Group of 77 for Special Commission 2 matters was that the Group found the report to be accurate, clear to read and "user-friendly". On the subject of the serious reservations expressed by the European Community and its member states to LOS/PCN/SCN.2/1992/CRP.6 and the points of view expressed in this regard, in particular whether or not any agreements had been reached in the Special Commission, he posed the question if it was not fair to say that an accomplishment of Special Commission 2, led by its Chairman (Lennox Ballah, Trinidad and Tobago) is the organization of the Training Panel. He also stated that LOS/PCN/SCN.2/1992/CRP.6 structures itself in such a way that someone just joining the deliberations of Special Commission 2 could determine where the Commission began its work and where the Commission is in relation to its work at this stage. He further went on to state that LOS/PCN/SCN.2/1992/CRP.6 accurately reflects what had transpired in the Commission, and as an aide to the reader, goes in great depth in its annexes and through the annotations to point out where there had been some movement in negotiating positions. It was the Group's point of view that the position of the Group of 6 was more that adequately reflected in the report.

11. A member of the Group of 6 reacting to the characterization of LOS/PCN/SCN.2/1992/CRP.6 as "user-friendly' expressed the view that the Group of 6 did not completely share that judgement. He stated that the suggested amendments contained in LOS/PCN/SCN.2/1993/CRP.8 were part of the effort of the Group of 6 to achieve this aim. He pointed out that the main part of the report could be found in pages 1-15 of LOS/PCN/SCN.2/1992/CRP.6 and that to fulfill the requirement of user-friendliness, the major negotiating positions of the different participants which were embodied in the annexes but not reflected in the main part should be moved to this part. To illustrate his point, he undertook a comparison of the suggested amendments contained in LOS/PCN/SCN.2/1993/CRP.8 and the provisions contained in the draft provisional final report (LOS/PCN/SCN.2/1992/CRP.6). He was able to demonstrate that most of the wording contained in the suggested amendments came from annexes 2 and 4 of LOS/PCN/SCN.2/1992/CRP.6, and paragraphs 20-22 of the same document.

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12. Following further discussions on whether or not consideration of the suggested amendments proposed by the Group of 6 constituted a new approach to the work of the Commission, the Chairman of the Special Commission suggested that the Co-ordinators of the two major interest groups represented in the Commission, namely the Group of 77 and the Group of 6 hold consultations to find language around which consensus could be reached. In the end, it was decided that the Chairman of the Commission who had full command of all of the information on the work of the Commission and who was best placed to ascertain the positions of the various interest groups should propose a text based on LOS/PCN/SCN.2/1993/CRP.8 for the consideration of the Commission.

b. Comments specific to the various sections of LOS/PCN/SCN.2/1992/CRP.6

13. Sections I and II of LOS/PCN/SCN.2/1992/CRP.6 entitled "Mandate of the Special Commission" and "Programme of Work" respectively, were acceptable to all members of the Special Commission.

A proposal was made by the delegation of the Russian Federation to include the following paragraph at the end of Section II:

"The Commission notes that no provision in this report, just as the absence of objections to the provisions in this report should be construed as prejudging the positions of the countries, which may be defined subject to possible agreement reached on the outstanding issues defined by the States which are currently under discussion in the consultations in order to give universal character to the United Nations Convention on the Law of the Sea". Not all delegations found the proposal acceptable. As a result this proposal was not reflected in LOS/PCN/SCN.2/1992/CRP.6.

14. In Section III, 1(a) entitled "Development of a training scheme", the view was expressed by the delegate of China that the elaboration of a training scheme by the working group from the Special Commission which commenced its work at the fifth session in 1987 is one of the most important achievements of the Commission. He pointed out that despite the difficulties faced by this working group, its unrelenting efforts resulted in the Principles, policies, guidelines and procedures for the Preparatory Commission training programme which later became the document for the implementation of training. For this reason, he suggested that a list of the members of the Ad Hoc Working Group on Training be added to paragraph 11 of LOS/PCN/SCN.2/1992/CRP.6 in keeping with the language used to list the members of the Chairman's Advisory Group on Assumptions as contained in paragraph 1 of annex 5 of LOS/PCN/SCN.2/1992/CRP.6.

15. All members of the Commission found the proposal acceptable and therefore between the first and second sentences of paragraph 11 of LOS/PCN/SCN.2/1992/CRP.6, the following language will be introduced to the report:

"Conscious of the need to reflect all interests and views it was agreed that the Ad Hoc Working Group on Training would include the four pioneer investors (USSR, France, Japan and India), Canada, Italy, China, Kenya, Tunisia, Bangladesh, Malta, Colombia, Jamaica, provisionally Denmark, the Council for Namibia and a representative from the International Ocean Institute".[1]

16. The only other comment on Section III was in relation to paragraph 14, 1(a). It was suggested that the information in this section be updated to take into account the results of the current meeting of the Training Panel

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[1] Paragraph 5 of document LOS/PCN/L.45 of 14 April 1987.

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17. With regard to Section III, 2 and 3, the Group of 6 in LOS/PCN/SCN.2/1993/CRP.8 had suggested the deletion of paragraphs 20-22 and 39, and proposed nine paragraphs elaborating the discussions by the Commission on (a) Transitional arrangements for the Enterprise and (b) Annotations on the provisions of the Convention relating to the structure and organization of the Enterprise.

18. Based on the request of the Special Commission that the Chairman propose language that captures the sentiment and position of the Group of 6 as provided for in LOS/PCN/SCN.2/1993/CRP.8, the Chairman proposed an alternative formulation which is contained in LOS/PCN/SCN.2/1993/CRP.9 of 25 March 1993 that is attached to this statement. Following consultations by the Group of 6 and the Group of 77, with the exception of paragraph 23 suggested in that document, the suggested amendments in LOS/PCN/SCN.2/1993/CRP.9 were acceptable to all members of the Commission. A new text was suggested to replace paragraph 23 as follows:

"In a statement on document LOS/PCN/SCN.2/L.8, the Group of 6 pointed out that since the Third United Nations Conference on the Law of the Sea many important changes had occurred and that changing circumstances may affect the provisions of the Convention relating to the Enterprise. Consequently, the Group thought it was inappropriate at this moment to annotate provisions of which one did not know whether and under what circumstances they would be applied".

All the members of the Special Commission found the suggested amendment acceptable and so the above wording will be the new language for paragraph 23 of LOS/PCN/SCN.2/1992/CRP.6

19. A number of specific comments were made in relation to Section IV of LOS/PCN/SCN.2/1992/CRP.6. As regards the title of the section "Recommendations of the Special Commission", the view was expressed that no recommendations were made and its title was misleading. It was proposed that the title of the section be changed to "Annexes". All members of the Special Commission found the proposal acceptable.

20. With regard to annex 1, "The Preparatory Commission Training Programme" no specific comments or amendments were proposed. All members of the Special Commission found its contents acceptable.

21. A number of specific comments and amendments were proposed for annex 2 of the report entitled "Recommendations regarding the organizational structure of the Enterprise". It was suggested that the words "Recommendations regarding ...." in the title be deleted. It was also suggested that the title of the document reproduced in this annex, document LOS/PCN/SCN/2/L.8/Rev.1 "Recommended annotations by Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise", should be changed to read "Annotations made in Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise". All members of the Special Commission found both proposals acceptable. The new title of annex 2 is therefore "The organizational structure of the Enterprise" and the new title for LOS/PCN/SCN.2/L.8/Rev.1 is "Annotations made in Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise".

22. With regard to the introduction to annex 2 a number of proposals were made that were acceptable to all members of the Commission as follows:

Paragraph 1

The first sentence of the paragraph is amended as follows: "The present paper contains the annotations made in Special Commission 2 on the structure and organization of the Enterprise".

Paragraph 2

The last sentence which reads "Those recommendations have been finalized and are contained in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1" is amended and will now read "These questions are dealt with in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1".

Paragraph 3

In the first sentence of this paragraph, the word "agreed" in the second line should be changed to "felt".

Paragraph 5

In the first sentence, the word "general" should be deleted.

Paragraph 6

The last sentence of the paragraph which reads "The Special Commission also decided to incorporate the statement which was made by the Group of 6 at the tenth session explaining why they wished to reserve their position on document L.8" should be deleted.

23. In respect of annex 3 "The Joint Venture Option for the Enterprise", it was suggested that the title of document LOS/PCN/SCN.2/WP.18/Rev.1 should be amended to read as follows:

"Draft basic Joint Venture Contract with annotations made in Special Commission 2". All members of the Commission found the proposal acceptable and so the new title of LOS/PCN/SCN.2/WP.18/Rev.1 is as above.

24. Similar proposals were made in respect of annex 4 of the document. All members of the Commission found these proposals acceptable. The new title of annex 4 is therefore "The initial operations and administration of the Enterprise", and the new title of document LOS/PCN/SCN.2/CRP.5/Rev.1 is "Annotations made in Special Commission 2 on the suggestions of the Chairman of the Special Commission to facilitate discussions on transitional arrangements for the Enterprise".

25. Finally, in the introduction to the above document, in the first sentence, it was proposed that the word "recommendations" be deleted and the word "annotations" substituted for it. All members of the Special Commission found the proposal acceptable. As a result the first sentence of the introduction to LOS/PCN/SCN.2/CRP.5/Rev.1 will read: "The present paper contains the annotations of Special Commission 2 to the Plenary of the Preparatory Commission on transitional measures that need to be taken to ensure that during the period between the time of entry into force of the Convention and the time when the viability of seabed mining is established (pre-operational period), there is no hiatus in the evolution of the Enterprise as an institution".

26. The titles of the individual annexes as presented on page 2 of LOS/PCN/SCN.2/1992/CRP.6 are to be modified accordingly.

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Closing Remarks

27. The Chairman of the Special Commission thanks all members of the Commission for their co-operation and assistance over the years of our deliberations. Special thanks and appreciate go to Baidy Diene of Senegal who was the Co-ordinate of the Ad Hoc Working Group on Training and who is now the Chairman of the Training Panel. The Chairman also expresses his gratitude to the Chairman's Advisory Group on Assumptions and to its Co-ordinator, Mr. Luis Praval of Cuba. It is our hope that the work of that Group will continue until the Convention comes into force and effect. The Chairman wishes further to put on record his deep thanks for the valuable work done by both Miss Gwenda Matthews and Mr. Nii Allotey Odunton, Secretaries to the Special Commission and also Miss Gabriela Gottsche. Finally our thanks go to all members of staff that have serviced the Special Commission beyond the call of duty.

UNITED NATIONS **LOS**

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEABED AUTHORITY
AND FOR THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA
Kingston, 22 March-2 April 1993

STATEMENT TO THE PLENARY BY THE CHAIRMAN OF SPECIAL COMMISSION 2 ON THE PROGRESS OF WORK IN THAT COMMISSION

1. Special Commission 2 held four meetings at the eleventh session. At the end of the tenth resumed session in New York, the Special Commission had established a programme of work for its current session. That programme of work, contained in paragraph 10 of document LOS/PCN/L.105, "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission", consisted of reviewing its draft provisional final report.

2. At the 140th meeting of the Special Commission, the Chairman of the Commission recalled the Special Commission's decision to review its draft provisional final report as contained in document LOS/PCN/SCN.2/1992/CRP.6 at the current session. The Chairman of the Commission stated the importance he attached to the draft provisional final report reflecting as accurately as possible the discussions that had taken place in the Commission over the years. He noted that in the absence of summary records of the meetings of the Special Commission, the statement to the Plenary by the Chairman of the Commission at the end of each session over the years had reflected as accurately as possible what had transpired in the work of the Commission. While informing the Commission that it had been scheduled to hold five meetings at the current session, he pointed out that since the Chairman of the Preparatory Commission had requested that the Statements to the Plenary on the progress of work in the various Special Commissions by their respective Chairmen be submitted by Wednesday, 31 March 1993, the Special Commission really only had four substantive meetings to conclude its consideration of LOS/PCN/SCN.2/1992/CRP.6, "Draft Provisional Final Report of Special Commission 2".

3. He stated the procedure outlined by the Chairman of the Preparatory Commission to facilitate consideration of the draft provisional final report in each of the Commissions to enable them to conclude their work at the current

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session. He pointed out that while the procedure did not allow for the renegotiation of issues that had been considered in the course of the Special Commission's work, it allowed delegations to comment on the draft provisional final report with regard to its accuracy and its reflection of the various points of view that had been expressed on those issues. He further pointed out that in the procedure outlined by the Chairman of the Preparatory Commission, proposed amendments to LOS/PCN/SCN.2/1992/CRP.6 could only be reflected in that report if the proposed amendments were agreeable to all of the members of the Special Commission. Comments or proposed amendments that were not agreeable to all of the members of the Special Commission would be included in his statement to the Plenary on the progress of work in Special Commission 2 at this, the eleventh session.

4. The view was expressed that a minority position of a group of delegations, a position that did not enjoy consensus, would, under this procedure, not be reflected and that the Chairman of the Commission should still take into account such minority positions. The Chairman of Special Commission 2 stated that all views would be reflected in the final report in a balanced way, even the views of an important minority group, whether or not those views were shared by all members.

5. The Chairman of the Commission began the discussions on LOS/PCN/SCN.2/1992/CRP.6 by inviting general comments on the document, followed by specific comments and/or proposed amendments on a section-by-section, chapter-by-chapter or issue-by-issue basis.

A. General comments on LOS/PCN/SCN.2/1992/CRP.6

6. Available to all members of the Commission were documents LOS/PCN/SCN.2/1993/CRP.7 of 28 January 1993, "Comments submitted by the European Community and its member States on the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6)"; and LOS/PCN/SCN.2/1993/CRP.8 of 28 January 1993, "Suggested amendments to the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6)", submitted by the delegations of Belgium, Germany, Italy, Japan, the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

7. In his statement to the Special Commission in response to a question raised by the Coordinator of the Contact Group of the Group of 77 regarding the serious reservations that the European Community and its member States had with respect to the draft final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6) as contained in LOS/PCN/SCN.2/1993/CRP.7, the representative of the European Community read out the following statement:

> "The European Community and its member States had stated in their paper (CRP.7) that the provisional final report of Special Commission does not reflect the state of discussions in that Commission. Further, they consider that the report is not sufficiently balanced. This can be illustrated with the following examples:

- The report does not reflect adequately the state of discussions on the transitional arrangements for the Enterprise;

- In effect it does not contain with sufficient detail the observations made by several delegations on the necessity to foresee a pre-operational period and, as a result, to provide for institutional arrangements for this period;

- It does not contain the recommendation agreed to in Kingston in 1992 on the initial institutional arrangements. This recommendation appears only in the annotation reproduced in CRP.5/Rev.1, pages 9 and 10;

- The report does not reflect the opinion of several delegations on the question of the structure and organization of the Enterprise after the initial phase and it does not contain the observation that the Enterprise should operate on purely commercial terms."

8. With regard to document LOS/PCN/SCN.2/1993/CRP.8 which contained suggested amendments to the draft provisional final report of Special Commission 2 (LOS/PCN/SCN.2/1992/CRP.6), the Coordinator of the Group of 6 in Special Commission 2 stated that the suggested amendments came from the Group of 6 since it was that Group and not the European Community and its member States that more closely followed the work of Special Commission 2. He pointed out that in the group's view, LOS/PCN/SCN.2/1992/CRP.6 was a bit short in its presentation of the various issues that had arisen in the consideration of its mandate. He pointed out that while the group was not stating that the contents of the report were not factual, other things had happened that if properly reflected in the report would more fully reflect the position of the Group of 6. As an example, he stated the group's support for an evolutionary approach to the Enterprise wherein at the beginning, the Enterprise is part of the Authority, a small office which works under the protection of the Authority and is part of the Authority, expanding as prospects for seabed mining improve. The Group of 6 was of the view that LOS/PCN/SCN.2/1992/CRP.6 did not reflect the kind of agreement reached in this regard, but seemed to imply agreement on the organization or institutional arrangement of the Enterprise. LOS/PCN/SCN.2/1993/CRP.8 contained suggested amendments to the text of LOS/PCN/SCN.2/1992/CRP.6 to take better account of the position of the Group of 6.

9. The view was expressed that LOS/PCN/SCN.2/1992/CRP.6 was clearly structured in the form in which it was required to be presented to the Commission as provided for in paragraph 3 of LOS/PCN/L.105 of 19 August 1992, "Statement to the Plenary by the Chairman of Special Commission 2 on the progress of work in that Commission". Another view was that the report being considered (LOS/PCN/SCN.2/1992/CRP.6) accurately reflected the discussions in the Commission.

10. A further view expressed by the Coordinator of the Contact Group of the Group of 77 for Special Commission 2 matters was that the group found the report to be accurate, clear to read and "user-friendly". On the subject of the serious reservations expressed by the European Community and its member States to LOS/PCN/SCN.2/1992/CRP.6 and the points of view expressed in this regard, in

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particular whether or not any agreements had been reached in the Special Commission, he posed the question whether it was not fair to say that an accomplishment of Special Commission 2, led by its Chairman (Mr. Lennox Ballah; of Trinidad and Tobago) was the organization of the Training Panel. He also stated that LOS/PCN/SCN.2/1992/CRP.6 had structured itself in such a way that someone just joining the deliberations of Special Commission 2 could determine where the Commission had begun its work and where the Commission was in relation to its work at the current stage. He further went on to state that LOS/PCN/SCN.2/1992/CRP.6 accurately reflected what had transpired in the Commission, and as an aid to the reader, went into great depth in its annexes and through the annotations to point out where there had been some movement in negotiating positions. It was the group's point of view that the position of the Group of 6 was more than adequately reflected in the report.

11. A member of the Group of 6, reacting to the characterization of LOS/PCN/SCN.2/1992/CRP.6 as "user-friendly", expressed the view that the Group of 6 did not completely share that judgement. He stated that the suggested amendments contained in LOS/PCN/SCN.2/1993/CRP.8 were part of the effort of the Group of 6 to achieve that aim. He pointed out that the main part of the report could be found in pages 1 to 15 of LOS/PCN/SCN.2/1992/CRP.6 and that to fulfil the requirement of user-friendliness, the major negotiating positions of the different participants which were embodied in the annexes but not reflected in the main part should be moved to that part. To illustrate his point, he undertook a comparison of the suggested amendments contained in LOS/PCN/SCN.2/1993/CRP.8 and the provisions contained in the draft provisional final report (LOS/PCN/SCN.2/1992/CRP.6). He was able to demonstrate that most of the wording contained in the suggested amendments came from annexes 2 and 4 to LOS/PCN/SCN.2/1992/CRP.6, and paragraphs 20 to 22 of the same document.

12. Following further discussions on whether or not consideration of the suggested amendments proposed by the Group of 6 constituted a new approach to the work of the Commission, the Chairman of the Special Commission suggested that the Coordinators of the two major interest groups represented in the Commission, namely the Group of 77 and the Group of 6, hold consultations to find language around which consensus could be reached. In the end, it was decided that the Chairman of the Commission, who had full command of all of the information on the work of the Commission and who was best placed to ascertain the positions of the various interest groups, should propose a text based on LOS/PCN/SCN.2/1993/CRP.8 for the consideration of the Commission.

B. Comments specific to the various sections of LOS/PCN/SCN.2/1992/CRP.6

13. Sections I and II of LOS/PCN/SCN.2/1992/CRP.6, entitled "Mandate of the Special Commission" and "Programme of work" respectively, were acceptable to all members of the Special Commission.

A proposal was made by the delegation of the Russian Federation to include the following paragraph at the end of section II:

> "The Commission notes that no provision in this report, just as the absence of objections to the provisions in this report, should be construed as prejudging the positions of the countries, which may be defined subject to possible agreement reached on the outstanding issues defined by the States which are currently under discussion in the consultations in order to give universal character to the United Nations Convention on the Law of the Sea."

Not all delegations found the proposal acceptable. As a result, the proposal was not reflected in LOS/PCN/SCN.2/1992/CRP.6.

14. In section III.1(a), entitled "Development of a training scheme", the view was expressed by the delegate of China that the elaboration of a training scheme by the working group from the Special Commission which had commenced its work at the fifth session in 1987 was one of the most important achievements of the Commission. He pointed out that, despite the difficulties faced by the working group, its unrelenting efforts had resulted in the Principles, policies, guidelines and procedures for the Preparatory Commission training programme which later became the document for the implementation of training. For that reason, he suggested that a list of the members of the Ad Hoc Working Group on Training be added to paragraph 11 of LOS/PCN/SCN.2/1992/CRP.6 in keeping with the language used to list the members of the Chairman's Advisory Group on Assumptions, as contained in paragraph 1 of annex 5 to LOS/PCN/SCN.2/1992/CRP.6.

15. All members of the Commission found the proposal acceptable and therefore between the first and second sentences of paragraph 11 of LOS/PCN/SCN.2/1992/CRP.6, the following language will be introduced into the report:

> "Conscious of the need to reflect all interests and views, it was agreed that the Ad Hoc Working Group on Training would include the four pioneer investors (USSR, France, Japan and India), Canada, Italy, China, Kenya, Tunisia, Bangladesh, Malta, Colombia, Jamaica, provisionally Denmark, the Council for Namibia and a representative from the International Ocean Institute." 1/

16. The only other comment on section III was in relation to paragraph 14. It was suggested that the information in this section be updated to take into account the results of the current meeting of the Training Panel.

17. With regard to section III.2, 3 and 4, the Group of 6 in LOS/PCN/SCN.2/1993/CRP.8 had suggested the deletion of paragraphs 20 to 22 and 39, and proposed nine paragraphs elaborating the discussions by the Commission on (a) transnational arrangements for the Enterprise and (b) annotations on the provisions of the Convention relating to the structure and organization of the Enterprise.

18. Based on the request of the Special Commission that the Chairman propose language that captured the sentiment and position of the Group of 6 as provided for in LOS/PCN/SCN.2/1993/CRP.8, the Chairman proposed an alternative formulation, which is contained in LOS/PCN/SCN.2/1993/CRP.9 of 25 March 1993. Following consultations by the Group of 6 and the Group of 77, with the

exception of paragraph 23 suggested in that document, the suggested amendments in LOS/PCN/SCN.2/1993/CRP.9 were acceptable to all members of the Commission. A new text was suggested to replace paragraph 23, as follows:

> "In a statement on document LOS/PCN/SCN.2/L.8, the Group of 6 pointed out that since the Third United Nations Conference on the Law of the Sea many important changes had occurred and that changing circumstances may affect the provisions of the Convention relating to the Enterprise. Consequently, the Group thought it was inappropriate at this moment to annotate provisions which one did not know whether and under what circumstances they would be applied."

All the members of the Special Commission found the suggested amendment acceptable and so the above wording will be the new language for paragraph 23 of LOS/PCN/SCN.2/1992/CRP.6.

19. A number of specific comments were made in relation to section IV of LOS/PCN/SCN.2/1992/CRP.6. As regards the title of the section "Recommendations of the Special Commission", the view was expressed that no recommendations were made and its title was therefore misleading. It was proposed that the title of the section be changed to "Annexes". All members of the Special Commission found the proposal acceptable.

20. With regard to annex 1, "The Preparatory Commission Training Programme" no specific comments or amendments were proposed. All members of the Special Commission found its contents acceptable.

21. A number of specific comments and amendments were proposed for annex 2 to the report, entitled "Recommendations regarding the organizational structure of the Enterprise". It was suggested that the words "Recommendations regarding" in the title be deleted. It was also suggested that the title of the document reproduced in the annex to document LOS/PCN/SCN.2/L.8/Rev.1, "Recommended annotations by Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise", should be changed to read "Annotations made in Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise". All members of the Special Commission found both proposals acceptable. The new title of annex 2 is therefore "The organizational structure of the Enterprise" and the new title for LOS/PCN/SCN.2/L.8/Rev.1 is "Annotations made in Special Commission 2 on the provisions of the Convention relating to the structure and organization of the Enterprise".

22. With regard to the introduction to annex 2, a number of proposals were made that were acceptable to all members of the Commission, as follows:

Paragraph 1

The first sentence of the paragraph is amended as follows: "The present paper contains the annotations made in Special Commission 2 on the structure and organization of the Enterprise".

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Paragraph 2

The last sentence, which reads "Those recommendations have been finalized and are contained in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1", is amended and will now read "These questions are dealt with in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1".

Paragraph 3

In the first sentence of this paragraph, the word "agreed" in the second line should be changed to "felt".

Paragraph 5

In the first sentence, the word "general" should be deleted.

Paragraph 6

The last sentence of the paragraph, which reads "The Special Commission also decided to incorporate the statement which was made by the Group of 6 at the tenth session, explaining why they wished to reserve their position on document L.8", should be deleted.

23. In respect of annex 3, "The joint venture option for the Enterprise", it was suggested that the title of document LOS/PCN/SCN.2/WP.18/Rev.1 should be amended to read as follows:

> "Draft basic Joint Venture Contract with annotations made in Special Commission 2".

All members of the Commission found the proposal acceptable and so the new title of LOS/PCN/SCN.2/WP.18/Rev.1 is as above.

24. Similar proposals were made in respect of annex 4 to the document. All members of the Commission found these proposals acceptable. The new title of annex 4 is therefore "The initial operations and administration of the Enterprise", and the new title of document LOS/PCN/SCN.2/1992/CRP.5/Rev.1 is "Annotations made in Special Commission 2 on the suggestions of the Chairman of the Special Commission to facilitate discussions on transitional arrangements for the Enterprise".

25. Finally, in the introduction to the above document, in the first sentence, it was proposed that the word "recommendations" be deleted and the word "annotations" substituted for it. All members of the Special Commission found the proposal acceptable. As a result the first sentence of the introduction to LOS/PCN/SCN.2/1992/CRP.5/Rev.1 will read: "The present paper contains the annotations of Special Commission 2 to the Plenary of the Preparatory Commission on transitional measures that need to be taken to ensure that during the period between the time of entry into force of the Convention and the time when the viability of seabed mining is established (pre-operational period), there is no hiatus in the evolution of the Enterprise as an institution."

26. The titles of the individual annexes as presented on page 2 of LOS/PCN/SCN.2/1992/CRP.6 are to be modified accordingly.

Closing remarks

27. The Chairman of the Special Commission thanks all members of the Commission for their cooperation and assistance over the years of our deliberations. Special thanks and appreciation go to Baïdy Diène of Senegal who was the Coordinator of the Ad Hoc Working Group on Training and who is now the Chairman of the Training Panel. The Chairman also expresses his gratitude to the Chairman's Advisory Group on Assumptions and to its Coordinator, Mr. Luis Preval of Cuba. It is our hope that the work of that Group will continue until the Convention comes into force and effect. The Chairman wishes further to put on record his deep thanks for the valuable work done by both Miss Gwenda Matthews and Mr. Nii Allotey Odunton, Secretaries to the Special Commission, and also Miss Gabriele Göttsche. Finally, our thanks go to all members of staff that have serviced the Special Commission beyond the call of duty.

Notes

1/ Para. 5 of document LOS/PCN/L.45 of 14 April 1987.

PART THREE

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UNITED
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CONVENTION ON THE
LAW OF THE SEA

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29 September 1983

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Preparatory Commission for the International
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Special Commission 2
Resumed first session
Kingston, Jamaica
15 August-9 September 1983

STATEMENT BY THE CHAIRMAN AT THE 1st MEETING OF SPECIAL COMMISSION 2 ON 9 SEPTEMBER 1983 [1]

You have done great honour to me, to my country and to the Latin American group, to which Trinidad and Tobago belongs, by electing me to the post of Chairman of the Special Commission for the Enterprise. I would like to express to you my own thanks and those of the country of Trinidad and Tobago for the confidence you have placed in me to guide the work of this Special Commission so as to ensure its early entry into effective operation.

The genesis of the Enterprise can be found in the 13-Power Latin American working paper which was submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction in Geneva on 10 August 1971. [2] The Trinidad and Tobago delegation had then the honour to introduce that working paper on behalf of the Latin American sponsors. Permit me to quote briefly from the statement made by the Attorney-General of Trinidad and Tobago on that occasion:

> "A body should be created, therefore, which, as the agent of the international community, would undertake direct scientific investigation, exploration of the area and exploitation of its resources. In the early stages, it would probably be more appropriate for the body to enter into joint ventures, establishing production-sharing and profit-sharing arrangements with other entities, public or private, national or international, rather than issuing licences to such entities" (A/AC.138/SC.I/SR.18).

The Enterprise was as bold and novel a concept as the concept of the common heritage itself. It was to be the beginning of a new kind of technical

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co-operation between developed and developing countries. The Enterprise was to be a multinational and not a transnational. It was conceptually to be owned by all the States. It was not to be a creature of either the Latin American region or the Group of 77.

Article 170 of the United Nations Convention on the Law of the Sea defines the role of the Enterprise as the organ of the Authority mandated to carry out activities in the Area and to transport, process and market minerals recovered from the deep-sea bed and ocean floor. Article 12 of annex IV of the Convention empowers the Enterprise to propose projects to the Council for carrying out activities in the Area in accordance with article 170 of the Convention itself. Under article 12 of annex IV, the Enterprise can function as a direct operator utilizing its own goods and services or it can enter into contractual arrangements for such goods and services. In short, the Enterprise is the contractual and operational arm of the International Sea-Bed Authority.

The first questions we must ask ourselves are: what is the mandate of the Special Commission for the Enterprise and what are its terms of reference? That mandate, those terms of reference, are found in paragraph 8 of resolution I, which is the constituent instrument of our Preparatory Commission. The terms of reference contained therein are:

(a) The Commission shall entrust to it the functions referred to in paragraph 12 of resolution II of the Third United Nations Conference on the Law of the Sea, relating to preparatory investment;

(b) The Special Commission shall take all measures necessary for the early entry into effective operation of the Enterprise.

In so far as the Special Commission is to take all measures, and I repeat all measures, to ensure the early entry into effective operation of the Enterprise, the mandate does not appear to be limited. It does allow for the free play of the creative imagination.

It is to be recalled that paragraph 12 of resolution II of the Third United Nations Conference on the Law of the Sea imposes on the pioneer investor certain obligations which would ensure that the Enterprise is put in a position to carry out activities in the Area in such a manner as to keep pace with States and other entities operating under the parallel system. It is to be noted that every registered pioneer investor has to carry out exploration in the reserved area; provide training and perform the obligations outlined in the Convention relating to transfer of technology before the entry into force of the Convention. In view of the interrelated nature of this issue, it would be quite impracticable for pioneer investment protection to be dealt with in plenary meetings independently of the Special Commission for the Enterprise. Joint consultative meetings for this purpose seem to be indicated.

It is therefore presumed that one of the main functions of the Special Commission for the Enterprise would be to make the necessary arrangements for the exploration of reserved sites or a reserved site, for training of personnel from

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both developed and developing countries, for the transfer of technology and for the creation of the institutional arrangements and the basic infrastructure necessary for this purpose.

The secretariat in document LOS/PCN/1 gives a useful interpretation of the mandate of this Special Commission by stating, among other things, that the measures necessary for the early entry into effective operation of the Enterprise would include:

(a) Different operational options;

(b) Project formulation, including feasibility study;

(c) Staffing requirements including training;

(d) Choice of technologies;

(e) Projection of financial requirements.

These are among the issues that we will have to examine in due course and make recommendations thereon to the Preparatory Commission.

With respect to the projection of financial requirements, the Special Commission has an essential input to make in respect of recommendations concerning the budget for the first financial period of the International Sea-Bed Authority.

The approach to our work must be realistic and pragmatic. The Enterprise, if it is to be one of the instruments for bringing benefits to mankind, must be a commercial profit-oriented corporation. It should not be service-oriented or assume the character of an international public utility. Its structure should therefore not be bureaucratically unwieldly. The Enterprise has to operate in a world of economic realities. In constructing a plan of work on the basis of our mandate, we must examine the world situation as it exists today and as it will exist in the foreseeable future. We must recognize that the political and economic situation is somewhat different from the situation that existed or was presumed to exist a few years ago when we drafted part XI and annexes III and IV of the Convention.

Not all mining States are likely to operate within the ambit of the system we are creating. This may indeed make our work more difficult.

Scientifically, ocean exploration has made dramatic steps forward. The discovery of the polymetallic sulphides has opened up new and exciting prospects. Recent findings seem to suggest that large metal deposits may be formed in the oceans within a decade. If this is so, these metal deposits would be like living resources, a renewable resource. In some industrialized countries, there is a new emphasis on exploration for deep-sea metals in exclusive economic zones. This is not without economic significance for the Enterprise and we can only ignore at our own risk.

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It was reasonably expected that sea-bed mining would be a commercially going concern by 1985 and that there would be income for the Authority and available funds for at least one integrated mining project for the Enterprise. The protracted recession, the instability of metal prices, the over-abundance of land-based metals, have changed that prognosis. Available evidence indicates that commercial sea-bed mining is not likely to begin before the late 1990s or the early years of the next century. In the next decade, therefore, activities in the Area will consist not in mining but in exploration, research and development. Our plan has then to be adjusted to take into account this harsh economic reality.

Resolution II establishes, for all practical purposes, an interim régime for exploration, research and development, for pioneer investors, be they States or entities. The Enterprise has no resolution II. It may, as a result, be necessary for us to create the same type of interim régime for the Enterprise so that it can perform exploration, research and development activities pari passu with States and entities.

I have decided at this 1st meeting to share these tentative preliminary thoughts with you. With your assistance, on which I am certain I can count, I am prepared to propose a procedure for our work which may be practical and expeditious. Before pursuing this line in any greater detail, I am of the view that at our next meeting it would be most useful if, in a short "free for all" discussion, members of this Special Commission would let us have their ideas and suggestions on the procedural and substantive directions we must take in order to satisfy our mandate. This approach to our work must be concrete, realistic and pragmatic. We must close our minds to no operational options and we must cost them with ruthless efficiency. That is the only way forward.

Notes

1/ Circulated in accordance with the decision taken by the Special Commission at its 1st meeting on 9 September 1983.

2/ See Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 21 (A/8421), document A/AC.138/49.

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19 March - 13 April 1984

AUSTRIA: PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION RESEARCH AND DEVELOPMENT IN OCEAN MINING

(JEFERAD)

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EXECUTIVE SUMMARY

IN THE FORM OF A DRAFT RESOLUTION

The Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea,

Conscious of its functions and purposes during the interim period between the signing of the United Nations Convention on the Law of the Sea, 1982, and its entry into force;

Desirous to encourage investments by States and other entities in a manner compatible with the international regime set forth in Part XI of the Convention and the Annexes relating thereto, before the entry into force of the Convention, and as set forth in resolution II;

Recognizing that the Enterprise must be provided with the funds, technology and expertise necessary to enable it to keep pace with the States and other entities during the interim period;

Recalling that resolutions I and II give to the Preparatory Commission the mandate to take all measures necessary for the early entry into effective operation of the Enterprise;

Conscious of the need to take adequate preparatory steps in this direction and to concentrate its activities in the Area in the interim period on exploration, research and development, data management, and training,

On the recommendation of its Special Commission for the Enterprise,

Decides as follows:

1. The Preparatory Commission intends to enter into a joint venture arrangement with States and other

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entities for the exploration, research and development of either the first, or, at its option, the second or the third reserved area accruing to it from the application of a pioneer investor under resolution II.

2. The joint venture arrangement referred to in paragraph 1 may be designated as *Joint Enterprise for Exploration, Research and Development*, hereinafter called JEFERAD.

3. Partners in JEFERAD should be States signatories to the United Nations Convention on the Law of the Sea, 1982, and entities whose components being natural or juridical persons possess the nationality of one or more States signatories to the Convention or are effectively controlled by one or more of them or their nationals, and are able and willing to contribute, in cash or in kind, to the establishment and operation of JEFERAD.

4. The participation of Partners in JEFERAD should be on fair and reasonable terms and conditions.

5. The Preparatory Commission shall be entitled to a share of 51 percent in the capital funds of JEFERAD.

6. The Partners should establish a Joint Enterprise Committee for managing and supervising the activities of JEFERAD. Participation and voting in the JEC should be based on the Partners' contributions to JEFERAD. The Preparatory Commission should appoint half of the members of the JEC, keeping in mind the interests of developing countries.

7. The activities of JEFERAD should be:

(a) the exploration of the ocean floor and deposit evaluation;

(b) research and development in mining technology, transport and processing, through

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(i) the establishment of a technology bank;

(ii) the testing of mining systems or the development of new concepts of mining systems;

(c) Training, through

(i) short, interdisciplinary foundation courses, for all trainees;

(ii) a scholarship programme for 1-2 years specialized technical training in cooperation with the pioneer investors;

(d) Preparation for the establishment of an Institute for Training, Research and Development as part of the International Sea-Bed Authority.

8. JEFERAD should be established for a period of five years, extendable by one year at a time by a decision of the Preparatory Commission on the recommendation of the Partners. If the Convention comes into force before the expiration of JEFERAD, JEFERAD should terminate its activities within six months from the entry into force of the Convention. If within this period, the JEC of JEFERAD proposes a plan of work to the Authority, it should be considered and given priority in accordance with the provisions of Resolution II and the Convention. The Enterprise will, in that event, succeed to the position and the rights of the Preparatory Commission in JEFERAD, and a new arrangement, to the extent necessary, may be concluded between the willing partners of JEFERAD. The participation of partners in JEFERAD shall continue to be on fair and reasonable terms and conditions.

9. A Group of Experts, having specialized knowledge or practical experience in the fields covered by this Resolution, is hereby established to examine the modalities for the establishment of JEFERAD, prepare a draft

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arrangement or memorandum of understanding for JEFERAD, and make such other recommendations relating thereto as they consider relevant and appropriate. The Group of Experts shall be composed as follows:

3 Experts nominated by Pioneer investors;

4 Experts nominated by the Commission.

Members of the Group of Experts shall be paid by their Governments, unless the Preparatory Commission can cover their cost from voluntary contributions. The administrative and maintenance expenses during the period of discussions in the Preparatory Commission or its Special Commission shall be borne by the United Nations.

The Group of Experts shall submit its report within a period of six months from the date of this Resolution.

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EXPLANATORY NOTE

The United Nations Convention on the Law of the Sea has been signed. The number of signatures obtained in the short time since it was opened for signature constitutes a record in the history of treaty making. The Convention provides a framework for a new international order in the oceans.

The Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea has been established: Its organization, rules of procedure and plan of work have been agreed upon. The Commission, endowed with operational capacity to fulfill its mandate, again, is an organ without precedent in the history of international organization.

Thus a new phase of the "Marine Revolution" has started. The Commissions's task, though apparently less complex and, it is to be hoped, more limited in time, will be no less arduous and demanding than the tasks of UNCLOS III.

While some of these tasks are spelled out precisely, others are phrased more broadly and flexibly. Thus, for instance, the Special Commission for the Enterprise has the mandate (Paragraph 8, Resolution I)

> *to take all measures necessary for the early entry into effective operation of the Enterprise.*

This includes a wide range of options.

Besides the explicit, or "written" tasks, furthermore, there may be implicit, "unwritten" tasks, arising from the facts of the situation. The most important of the unwritten

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tasks of the Commission is to *manage transition* : transition from legislation to implementation; transition from the economic and scientific situation that existed in the 1960s and 1970s -- on which the Convention is based -- to the economic and scientific situation as it emerges in the 1980s and 1990s, within which the new ocean institutions will have to operate. The main unwritten task of the Commission is to adjust the ideas and ideals of the '60s and '70s to the economic, scientific, and political realities of the '80s and '90s.

Many changes have taken place, which may radically affect the new régime.

Under the scientific aspect, there has been a twofold shift. First, recent research has shed new light on deep-sea mineral resources other than manganese nodules. The polymetallic sulphides discovered off the Galapagos Islands, and off the coast of the Western United States and Canada, have attracted a great deal of attention in the international scientific community and given rise to the expectation that there may be similar resources in many other places within the 97 percent of the ocean floor that has not yet been explored.

Secondly, it has become apparent that deep-sea mineral resources -- whether manganese nodules or polymetallic sulphides or other -- are not necessarily concentrated in the Area but have been and will be found in areas under national jurisdiction. Many deposits may straddle national boundaries or boundaries between areas under national jurisdiction and the Area.

While there may be gaps in the new information, just as there were gaps in the old one, the new discoveries cannot be ignored. If it is the responsibility of the International Sea-Bed Authority to carry out marine scientific research concerning the Area and its resources, and to enter into contracts for this purpose, and, furthermore, to promote and encourage the conduct of marine scientific research in the

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Area and to co-ordinate and disseminate the results of such research and analysis when available, (Art. 143), this scientific research, in the '80s and '90s, must be far more comprehensive than was assumed in the '60s and '70s. It must comprize manganese nodules as well as other mineral resources in the deep seabed, in the Area and, in cooperation with member States, across the boundaries of the Area and in areas under national jurisdiction.

Under the economic aspect, the operations of the Sea-Bed Authority had been projected on the assumption that there would be a considerable number of applications for contracts for integrated mining projects in the imminent future: that, in fact, there might be more applications than available mine sites; that production limitation would have to be applied and that, in any case, full-scale commercial production would be on stream by 1985.

The deep, protracted Recession has played havoc with all these projections. And even if the Recession were to recede tomorrow, it has effectively slowed down research and development in mining and processing technology to such an extent that no integrated, commercial mining project may be conceivable for the next fifteen years.This may imply a tendency to make the drafting of rules, regulations and procedures as abstract, futuristic, and beset with uncertainties as was the drafting of Annex III, which the Preparatory Commission must consciously try to avoid.

The adoption of Resolution II has solved this problem, at least partly, by establishing, de facto, an interim régime for exploration, research and development. It responds to the needs of those States and companies who have invested in exploration, research and development, and enables them to continue to do so by guaranteeing a contract for exploitation, when the time comes, and protecting their investment.

Resolution II ensures the proper functioning of the

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side of the Contractors in the parallel system during the transition period. While it imposes important obligations on the Pioneer Investors to assist the Commission in preparing for the early entry of the Enterprise into effective operation, the preparatory protection of the *Enterprise side of the parallel system* is far less structured: It lacks a legal and institutional framework.

The purpose of the present study is to contribute to the establishment of an interim/preparatory régime for exploration, research and development for the *Enterprise side of the parallel system* , "to ensure that the Enterprise will be provided with the funds, technology and expertise necessary to enable it to keep pace with States and other entities," a need recognized in the third preambular paragraph of Resolution II and re-affirmed in the *chapeau* to operative paragraph 12 of the same Resolution.

To create the institutional infrastructure capable of receiving and utilizing the services to be rendered by the Pioneer Investors under paragraph 12 of Resolution II, it is suggested that the Commission should take the initiative for the establishment of a *joint venture* or *Joint Enterprise for Exploration, Research and Development* (JEFERAD), open to those developed or developing States and those companies who wish to participate, and financed partly by industry, partly by Governments, and partly by public international funding institutions.

The Commission, having the legal capacity necessary for the exercise of its functions and the fulfilment of its purposes, is empowered, in paragraph 8 of the Resolution to "take all measures necessary for the early entry into effective operation of the Enterprise." Hence, if it is agreed that the establishment of JEFERAD is indeed a measure necessary for the early entry into effective operation of the Enterprise, the Commission, through its Special Commission for the Enterprise, is empowered to take this measure It should be noted, however, that the Commission does not have borrowing power. Contributions from

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international funding institutions should therefore be in the form of grants.

JEFERAD should be assigned the first suitable "reserved area" prospected by a Pioneer Investor. Just like the Pioneer Investor, it should submit a plan of work within six months of the coming into force of the Convention. There should be -- if all parties freely agree - a new joint-venture agreement at that time, covering the production and any subsequent phase as may be decided between the States and companies and, at this second stage, the Enterprise.

The advantages of JEFERAD would be obvious.

1. JEFERAD would be *complementary to PIP* in establishing an effective parallel system for the phase of exploration, research and development, which will constitute the sole activities in the Area, now and for the foreseeable future.

2. It would enhance exploration, research and development in ocean mining: giving it a boost, which is badly needed. As one experienced U.S. ocean miner put it recently, considering the extremely low level of investments that have gone into ocean mining R&D during the past two years, it is clear that imaginative initiatives in international cooperation are needed.

3. For developed countries, it would cut the cost of investment in R&D as much as 50 percent. For example: Company X in industrialized country A would need roughly $200,000,000 for the next phase of exploration and R&D. Since this kind of money is not available during the current recession, activities are reduced and "put on the back-burner." With JEFERAD, the Commission would be responsible for raising up to 51 percent of this amount in voluntary contributions. The rest of the investment would be shared by the companies and States participating. If the first phase of R&D required the pooling of the private

sector in multinational consortia, the second phase, which is far more costly, would certainly be greatly facilitated by an even wider cooperation between the private and the public sector, national and international.As Alexandra Post pointed out in a recent article ("The implications of change in mining finance and participation," Erzmetall, 36 (1983) Nr. 7/8)), "Along with a major shift in financial partners in recent years, private corporations and state agencies often conjoin in joint ventures and in a variety of other contractual arrangements....It is also clear that, with the emergence of many new contractual and legal relations between the corporate entity and the once but regulating, now even producing public authority, the traditional distinctions between the public and private sectors -- between business and government -- are becoming blurred..." An undertaking like JEFERAD thus would fit neatly into current trends.In any case, the role of JEFERAD in promoting the interests of the Enterprise and developing States would remain intact and woud not be adversersely affected,even though opportunities would be provided to industrialized States and their companies, to the socialist States and to Pioneer investors to participate in cooperation.

4. For Socialist countries, the arrangement should be equally advantageous. Nor should they encounter any legal or institutional difficulties.For instance, the Government of Cuba has recently (February 15, 1982) issued a decree on economic association between Cuban and Foreign Entities, which provides for the establishment of *Joint Enterprises* in which foreign companies can hold as much as 49 percent of the shares. "The joint Enterprises will be completely independent of the State. They will have absolute freedom in appointing the board of directors and managerial personnel, defining the production plan, setting prices and drawing up sales plans, deciding how many people will be hired and selecting them, signing contracts with national and foreign entities, choosing the accounting system, determining financial policy, etc." (International Legal Materials, Vol. XXI, Number 5, September 1982).

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The People's Republic of China, likewise published, on July 11, 1979, a Law on joint ventures. Article 1 states:

> "With a view to expanding international economic cooperation and technological exchange, the Peoples Republic of China permits foreign companies, enterprises, other economic entities or individuals (hereinafter referred to as foreign participants), within the territory of the People's Republic of China,into joint ventures with Chinese companies, enterprises or other economic entities (hereinafter referred to as Chinese participants)."

Each party may contribute cash, capital goods,industrial property rights, etc. as its investment share in the venture.Foreign participation shall be in general not less than 25 percent, but there is no limit of 49 percent, as in the Cuban law.

The composition of the Board of directors is to be stipulated in the contract of Association. However, the Chairman of the Board is to be appointed by the Chinese participant; one or two vice-chairmen, by the foreign participants. On important problems, the Board of Directors shall reach decisions through consultation by the participants on the principle of equality and mutual benefit.

Under the Cuban as well as under the Chinese law, the applicable law for the joint enterprise or joint venture is the national law, whereas, in JEFERAD, it would be international law.

5. For developing countries, direct participation in the management of a high-technology development project would provide extraordinary if not unique opportunities for the training of scientists and technicians and the acquisition of high technology.

6. The *codevelopment of technology* would eliminate

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many of the problems of the *transfer of technology.* Co-development is far less costly to developing countries than transfer. Co-develpment is a gradual process which creates its own scientific and economic infrastructure as it moves along. Last year, President Mitterand of France, opening the "summit" at Versailles, proposed the launching of a "concerted programme" by establishing "international commissions for research and development and for technical cooperation between private and public firms and States." In this proposal he stressed the importance of the participation of developing countries in joint undertakings to assure acquisition by them of the new technologies. JEFERAD would be the first major embodiment of this great idea.

7. The first phase of exploration and R&D is of crucial importance for the subsequent (overlapping) phases of exploitation, transportation, processing and marketing. While offering some direct, immediate benefits, it provides the best opportunity to maximize benefits from the later, productive stages of a mining project.

8. The current trend in contracts for mining and oil production appears to be toward shorter-term contracts, covering only one or two stages of an integrated project. JEFERAD would fit into this trend -- envisioned, and provided for, in the Convention itself.

9. Restriction to exploration and R&D would avoid, for the time being, the problem of *production limitation,* thus giving the Commission, and its special commission on the problems of developing land-based producer States, time to find realistic solutions in the context of present and forthcoming developments.

10. All partners in JEFERAD would have to contribute equity in the form of capital and technology, if the project is to be of equal and mutual benefit to all partners and to the Commission.

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JEFERAD would, most likely, be a "classical joint venture," not a "joint venture corporation." In a "classical joint venture," the parties do not lose their legal personality. JEFERAD would be nonprofit, and would be established for a limited period, let us say, for five years, to begin with, although this period might be extended, if all partners agree. The partners could be pioneer investors or other signatory States or entities duly sponsored by signatory States. Membership need not be restricted to pioneer investors, since, in this case, it is not so much past investment as investment in JEFERAD that counts.

JEFERAD would undertake exploration and deposit evaluation. To explore a site of 150,000 square km to begin with (portions of it would have to be relinquished successively), at least sixty one-month-long expeditions are required. The research ship could be contributed by one of the pioneer investors (a developing country) which happens to have the most advanced and the most beautiful oceanographic ship in the world.Additional research ships could be added subsequently.

There are about 25 factors involved in the calculations needed to determine the economic value of a deposit of manganese nodules, such as grade of nodules, concentration of nodules per unit area of ocean floor, size distribution of nodules, physical characteristics of the associated sediments, depth of water, distance to port or processing facility, topography of the ocean floor in the deposit area, and weather in the deposit area.

The practical consequence of rapid, thorough,

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comprehensive economic explorability on the one hand, and variations in the factors which will collectively determine the economics of the exploitation of the deposit on the other, is that it is possible for the first-generation mine site to be many times more profitable than lower grade deposits that may come up for mining in the future.

This is a consideration of crucial importance in decisions relating to the nature and content of exploration programmes, the time frame within which they should be carried out, the investments justified on these programmes, as also the R&D efforts. It is vitally important that work for the future Enterprise in deposit evaluation be undertaken now, simultaneously with the work of the private sector. Otherwise, and in spite of the banking system, the private sector may end up with mine sites many times more profitable than those of the Enterprise which thus will have lost the race before even starting.

It is obviously impossible to give a realistic estimate of what the costs to JEFERAD for exploration, research and development might be. The Cost Model of Deep Ocean Mining and Associated Regulatory Issues published in 1978 by the MIT gives the following estimate (in million dollars):

1. Research & Development Program			
Total R&D Program Cost			50.00
2. Prospecting and Exploration Programme			
Prospecting		1.6	
Exploration			
Research Team			
Salaries & Benefits	0.66		
Discrete Survey	2.60		
Continuous Survey	11.50		
Subtotal Exploration		14.8	
Total Prospecting and Exploration Program Cost			16.40
Total for Exploration R&D		US$66.40	

In a quite recent publication (Bureau of Mines Circular/1983), the U.S. Department of the Interior projects exploration costs (for 6 years) as $39.8 million, and costs

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for R&D as $69.3 million, that is, a total for Exploration, R&D of $89.1 million.

Conrad (Welling (U.S. Mining Congress) estimates costs for exploration at the same level, but total for exploration, R&D for the next 5 years, at $300 million. He points out the importance of focusing on pilot-plant scale operations and scaling up of technology rather than basic R&D, which American companies have already behind them (Personal communication).

To remain somewhere inbetween these estimates, and including an inflation factor, let us project the cost for Exploration, R&D as $140.00 million.

The R&D to be undertaken would cover *mining technology, transportation, and processing.*

This R&D might have three major components: A survey of state-of-the art technology and the acquisition of existing technology for the Enterprise. This might take the form of a *GEFERAD Technology Bank* , to which participating companies might cede, voluntarily, at fair and commercial conditions, patents, etc., the transfer of which might be of mutual interest.

Secondly, R&D would consist in the *testing of mining systems or the development of new systems of mining concepts* : the development of collectors, of lifting gear, etc.

UNIDO recently published a study (5 October 1982, UNIDO/IS.345), edited by this writer under the title Ocean Mining and Developing Countries: An Approach to Technological Disaggregation. This study contains a series of tables showing subsystems of mining technology disaggregated into yet smaller systems which are marked in order of their complexity and stage of development. A glance at the tables, which are reproduced in Annex 10, clearly

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indicates where research and development is needed. It also shows, especially to analysts in developing countries, which are the technologies that either are already available in developing countries or could easily be developed, with spin-off benefits for other sectors of industry.

For a more detailed analysis of Processing R&D, the reader is referred to the four excellent volumes published recently by the Department of Energy, Mines and Resources, Canada (1979, 1980). (It should be noted that the construction of a complete operational processing plant, according to the Canadian study, would run to about one billion Canadian dollars; the figure given by the U.S. Department of the Interior is quite similar: U.S.$ 886.3 million for a 3 million t/y facility.)

These references are intended merely to indicate the range of R&D still needed. If this work goes on in the private sector during the next five years, and the Enterprise has to buy the fully developed technology, once the convention comes into force, obviously the price to be paid by the Enterprise will be very much higher than the cost of investing now in JEFERAD, which would develop this technology on the basis of international cooperation and make it available to the Enterprise. The time to take such a decision is now.

The third component of a R&D programme for JEFERAD would be *training*. Training of manpower from developing countries, enabling these developing countries to fill their posts in the future Enterprise and in the other organs of the Authority, once the convention is ratified. Again, the time to take decisions and prepare for that moment is now: If one were to wait with this training until the Convention is ratified and the Authority established, it would be too late: the gap between the few States possessing seabed mining expertise and the many poor countries which don't, must not be allowed to widen further.

The training component of JEFERAD should consist of two

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subcomponents:

A Foundation Course of 10 weeks, covering all aspects of deep-sea mining: scientific/technical; economic; managerial; environmental; legal; institutional. And a two-year specialized technical training programme.

The first, which is important considering the absolute novelty of the Seabed Authority, its structure and functions in the context of the making of a New International Economic Order, could be achieved, most economically, through cooperation with the IOI Training Programme, Class A, Seabed Mining, which has been developed by the International Ocean Institute over the last four years, under the direction of Ambassador Reynaldo Galindo Pohl and in cooperation with the Technical University of Aachen (Federal Republic of Germany, Preussag AG (Fed.Rep. of Germany) and all the competent institutions in the U.N. system.

The second training sub-component should be developed in cooperation with the pioneer investors, in accordance with Resolution II, para 12 (a)(ii). It might take the form of a scholarship system, to send gifted young marine scientists to the best technical institutions for a 2-3 year period; or of practical on-the-job training through the industries themselves, or , later on, as one delegate, Mr. Kazemi of Iran suggested during the Conference (A/CONF.62, SR23), the establishment, by the Authority, of an Institute responsible for keeping young research workers in the developing countries informed of the latest technology.

The cost of a "foundation course" of ten weeks for twenty-five participants is about US$200,000. If one hundred participants from developing countries should be trained each year, which would seem a reasonable number, four courses should be conducted annually, at a total cost of US$800,000. This would cover over-seas travelling for the participants as well as ten weeks room and board, medical insurance, teaching materials, field trips and pocket allowance as well as the costs for the teaching and

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administrative staff.

The two-year technical training should not cost the Commission anything as it should be carried out by the Pioneer Investors.

The establishment of an Institute might cost $20 million over a five-year period -- an estimate based on the recently approved budget for the International Centre for Ocean Development (ICOD) established by the Federal Government of Canada.

The total operating budget for JEFERAD for a period of five years might thus look aproximately as follows(in million US$):

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Exploration		
ResearchTeam Salaries and benefits	1.40	
Discrete Survey	6.00	
Continuous Survey	25.00	
Total Exploration cost		32.40
Research and Development		
Technology Bank	100.00	
Testing of mining systems development of new mining concepts	43.6	
Foundation Courses	4.00	
Institute	20.00	
Total Research and Development		167.60
GRAND TOTAL FOR FIVE YEARS		200.00

To collect half this amount, over five years, that is, $20 million a year, in voluntary contributions, is not so much a financial problem as it is a question of political will.The other half could again be divided into two parts: one half to be borne by industry: we are now down to $50 million which could be divided among as many companies as wish to participate, in whatever proportion they wish to, and the remaining $50 million could be paid by the certifying Governments: Again, not so much a financial problem as a question of political will. A similar division of costs, incidentally, has been agreed on by the EEC for research and development in advanced technology: With the Community paying one half of the cost, and industry and States Members sharing the rest.

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Kingston, Jamaica
19 March - 13 April 1984

AUSTRIA: PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION RESEARCH AND DEVELOPMENT IN OCEAN MINING (JEFERAD)

Addendum

Additional explanatory notes as conveyed to the Special Commission for the Enterprise in the Statement of the delegation of Austria on 23 March 1984

INTRODUCTION

Let me make it clear from the outset that my delegation is not introducing a resolution. We are introducing a working paper as a possible basis for discussion. "The Executive Summary in the Form of a Draft Resolution" was merely a "poetic" device - and I am using the term "poetic" in its original Greek meaning, as "creative": Poiein means to make something - a poetic device, then, to put the guiding ideas of this study into a nutshell.

The purpose of this study is to explore ways and means to keep the development of the Enterprise in line with the progress of the activities of pioneer investors and to do so in the light of the important changes that have taken place since the drafting of part XI of the Convention and the annexes thereto. These changes have been partly generated by the Law of the Sea Conference itself, partly by economic and scientific developments beyond its control.

Let me mention some of these latter first.

Whatever the reasons may be, there has been a notable shift in the scientific community, in the industrialized States from research on manganese nodules to research on other forms of mineral accretions in the deep sea bed and from the international area to areas under national jurisdiction. Let me give you just a few examples.

As is well known by now, large polymetallic sulfide deposits have been discovered on spreading ocean ridges. One such centre, Juan de Fuca Ridge off the northwest United States coast and British Columbia, has been estimated to contain deposits with high quantities of zinc, iron and copper and lesser quantities of silver, cadmium chromium and platinum. Recent studies along the Juan de Fuca Ridge have caused investigators to raise their estimates of the quantity of minerals present. The deposits may be more than 100 miles wide (Ocean Science News, November 21, 1983).

A process to recover silver (97 per cent) and zinc (99 per cent) as well as copper (78 per cent) from these sulfides has already been developed by the United States Department of the Interior's Bureau of Mines. Details of the sample analysis and leaching tests are available. The concentration of copper in the sulfides reaches 11 per cent.

Seafloor crusts at depths of 3,200 to 8,200 feet on the flanks of many United States island possessions and territories in the Pacific have been discovered which are rich in cobalt, nickel and manganese. The deeper crusts are the richest in cobalt (Ocean Science News, 21 November 1983).

Richer deposits of minerals than ever before seen in seafloor crusts have been discovered by marine geologists aboard the Interior Department's research vessel S. P. Lee. The Department of the Interior announced that preliminary sampling of the area between the Hawaiian Islands and Samoa has located deposits of cobalt, nickel and manganese that are richer by far than seen before.

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A seamount about 160 miles northwest of Palmyra Atoll and Kingman Reef (United States territorial possessions) produced thin pieces of crust with cobalt concentration of about 2.5 per cent, more than twice what had been found earlier, 0.8 per cent nickel and 32 per cent manganese.

And I could go on. New discoveries are announced practically every month.

In the meantime, as was noted here during the last session, the Japanese press reported in August 1983 that four international consortia led by American companies and consisting of British, Canadian, West German, Belgian, Italian and Japanese firms as well as the French semi-state company AFERNOD had completed the division of some sea-bed sites south of Hawaii that were rich in manganese nodules.

It is obvious that these discoveries and developments create a totally new context for our work. Had we been aware of these during the 1970s, surely, part XI would be different from what it is now, and we must now take it upon ourselves as our task to adjust, strictly within the terms of the Convention, to these changed circumstances in which ocean mining

(1) will not be restricted to manganese nodules but comprise other forms of mineral deposits;

(2) will not take place exclusively or even primarily in the international Area, but will include areas under national jurisdiction.

This raises serious problems of adjustment for the Convention. That is, we have to learn to use and develop those parts - many - that can be used in the new context, and not to press too hard for the application of parts - a few - which are inapplicable in the new situation. Law-makers have had to face such situations in the past, and they will have to face them in the present and in the future: it can be done. Suffice it to remind ourselves that the United States Constitution was written by and for a society consisting of less than 4 million inhabitants including about half a million voters; a rural society without metropoles, without labour unions, without corporations, and without political parties. And it still works, in a fundamentally different context.

The great change generated by the Law of the Sea Conference itself, obviously, is resolution II which, for all practical purposes, creates an interim régime for exploration, research and development for the pioneer investors. This will be a very active régime, with two pioneer investors already knocking impatiently at the door.

Thus the danger arises that while one arm of the parallel system moves aggressively forward in exploration, research and development and is assured of its right to produce once the Convention comes into force and the economic situation permits, the other arm of the parallel system, the Enterprise, should languish in uncertainty and fall behind - in violation of the spirit and the letter of the Convention.

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Undoubtedly, resolution II imposes certain obligations on the pioneer investors, with regard to exploration of reserved sites, transfer of technology and training of personnel, but, such as things are at this moment, there is no infrastructure ready to receive and utilize such services.

The purpose of our study is to show how infrastructure could be created in such a way as to carry over directly into the establishment of a viable Enterprise system as soon as the Convention comes into force.

For this purpose we propose that ways and means be examined to establish a Joint Enterprise for Exploration, Research and Development (JEFERAD), under the auspices of the Commission.

JEFERAD clearly would be equally advantageous for pioneer investors, developing countries, and the future Enterprise. For pioneer investors, it would cut investment costs in half at a time when private investment in ocean mining research and development has practically come to a halt. For developing countries, JEFERAD offers a unique opportunity for participation in a high-technology management venture and the possibility of co-development of technology rather than the transfer, the latter being far more expensive. And for the International Sea-Bed Authority and the Enterprise, JEFERAD would generate an institutional framework that might turn out to be most practical when the Convention comes into force and the phase of exploitation begins.

Our study is divided into four parts.

The first part, the Executive Summary in the Form of a Draft Resolution, gives the reasons for the creation of JEFERAD, establishes the legal basis for its creation in paragraph 8 of resolution I which gives to the Commission broad powers "to take all measures necessary for the early entry into effective operation of the Enterprise". It defines the potential participants in JEFERAD: Any State signatory to the Convention, or any company sponsored by such a State and able and willing to contribute in cash or in kind to the establishment and operation of JEFERAD. In other words, participation is purely voluntary. This summary outlines, in quite general terms, the structure of JEFERAD, leaving all details to be elaborated by the partners in accordance with real circumstances and generally accepted practice; it defines the activities of JEFERAD as exploration, research and development, including the establishment of a technology bank and the training of personnel; it suggests that JEFERAD should be established for a period of five years - a reasonable time for a project of exploration, research and development, or up to the moment when the Convention comes into force: whichever comes first.

This, of course, does not mean at all that JEFERAD must come to an end at that time. Quite the contrary, participants would be free to renew the terms of the Joint Enterprise. They could, like any other pioneer investor under resolution II, submit a plan of work and obtain a priority production permit. This indeed would be the only way to get the Enterprise started at the same time as the contractors.

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However, we have left this transition to be voluntary. It is quite obviously in the interest of those who have invested in JEFERAD for exploration, research and development to continue the arrangement into the exploitation stage, but to keep the transition voluntary will avoid some of the difficulties we have had with other proposals in the past for mandatory joint ventures.

Finally, the executive summary suggests the establishment of a group of experts to prepare for the implementation of JEFERAD and explore the possibilities of raising the necessary funds for the Commission: Funds which must come in the form of grants, since the Commission has no borrowing power. This group of experts should be small. We suggested it should consist of seven members: three to be nominated by pioneer investors; and four to be nominated by the Commission as a whole. It is interesting that we have already one offer for the funding of the work of this group of experts.

The second part of our study is entitled "explanatory note". It spells out in detail what has been set forth succinctly in the summary. It provides a budget, based on the most recent available figures, for exploration, research and development, including training of about 100 persons from developing countries per year, for the benefit, not only of the Authority but of developing countries themselves.

The explanatory note also analyses the advantages of JEFERAD in the present context of economic conditions and technological development:

1. JEFERAD would be complementary to PIP in establishing an effective parallel system for the phase of exploration, research and development, which will constitute the sole activities in the Area, now and for a considerable length of time to come.

2. It would enhance exploration, research and development in ocean mining: giving it a boost, which is badly needed since no "risk capital" has been forthcoming during the past two years.

3. To the developed countries and their companies the plan would offer considerable savings: a reduction of capital investment of over 50 per cent, since the Commission would have to come forward with 51 per cent of the investment. This would be a very important advantage to all industrialized States, whether free-market or centrally planned. It would be of particular advantage to medium-sized or small industrialized States who would have no chance to enter ocean mining individually. Among these, it would be of special interest to the land-locked States who can benefit from the new Convention chiefly through co-operation with international organizations.

4. On the part of the developing countries, direct participation in the management of a high-technology development project would provide extraordinary and unique opportunities for the training of scientists and technicians and the acquisition of high technology.

5. The co-development of technology would eliminate many of the problems of the transfer of technology. Co-development is far less costly to developing countries than transfer, and has other advantages that we enumerate in our study.

In short, we are convinced that JEFERAD would be of equal advantage to developing and developed countries, to the "North" and to the "South", to the "East" and to the "West". And it is projects of this sort: bridge-builders, new forms of scientific/industrial international co-operation, that are needed and that have the greatest chances of success.

At the same time, we can think of no more efficient way to get the Authority and its Enterprise system started than by adapting its use to the reality of today and defining a path that may lead from the here and now to a situation that may exist 20 years from now.

The third part of our study provides the historical background to the present proposal: a survey of the history of the joint-venture concept from the early days of the Sea-Bed Committee to the Nigerian, the Austrian, and the Netherlands proposal towards the end of the Conference. Looking over this material today, one is indeed impressed by the enormous importance this concept held throughout the negotiations leading to the adoption of the Convention. There appears to have been, indeed, a tacit admission, on the part both of developed and developing countries, that the joint venture approach was the most realistic and the most promising one, for the Authority and for the Enterprise, even for the effective working of the parallel system itself.

The fourth part, finally, consists of annexes documenting the preceding parts. For reasons of time, this part has been omitted in the text as distributed by the Secretariat. We do have a number of complete copies, though, for anyone interested. Most of this material is familiar to most of the delegates, although we have added some "unofficial" material which is not easily accessible. The Austrian proposal itself, for instance, was made during an Intersessional meeting in Geneva in March, 1977, and although it was included in a report issued by the Secretariat, it is not included in the official records of the Conference. We have also added a technical annex of tables, taken from a UNIDO study, disaggregating ocean mining technology and showing, in an easily readable way, which technological systems and subsystems are fully developed and which require further research and development, as well as the degree of their complexity. We though it might be useful to have all this material assembled in one place.

The crux of the whole matter, at this point, is that the Commission should come up with some funds; $ 20 to 30 million a year for a five-year period. We all know that the success of the Convention will largely depend on whether the world believes that this Commission can proceed in an effective and businesslike manner. What better way of proving this, than to come up with some cash?

The amount to be raised, however, is modest: relatively very modest, if compared to the kind of money that would have to be raised at this time had we had to provide for an Enterprise engaging, in the 1980s, in an integrated mining project. At this point, it is not so much a financial problem as it is a question of political will.

Both among developed and among developing countries there seems to be a keen desire to create and support enterprises of just the kind we are proposing. In our study we quote President Mitterand of France who proposed the launching of a "concerted programme" by establishing "international commissions for research and development and for technical co-operation between private and public firms and States". In this proposal he stressed the importance of the participation of developing countries in joint undertakings to assure acquisition by them of the new technologies. JEFERAD would be the first major embodiment of this great idea.

In a recent publication of the Third World Foundation (The Rich and the Poor) Dragoslav Avramovic, reviewing the decisions of the High-Level Conference on Economic Co-operation among Developing Countries held in Caracas in 1981, recommends joint ventures, among other things, in mining. "In part, this operation might be viewed as something like a South-South IFC. It could involve itself either as a direct investor in an approved joint venture, or as a broker bringing together various sources of finance while not engaging its own funds directly. By contrast with the IFC, however, the proposed institution would view its investments in joint ventures as long-term in nature, a publicly owned and run holding company. In 1979, Dr. M. W. Kjouja, Economic Adviser of the Kuwait Fund for Arab Economic Development had made this proposal".

Co-operation and co-ordination might also be sought with the Revolving Fund, administered by UNDP and the World Bank, to assist developing countries in the exploration of solid mineral and geothermal energy resources.

And there may be other ideas and approaches.

The fact is that, at this stage of our work, we have to be fully realistic with regard to the assessment of the context within which we are moving, and forward-looking and creative in the responses to the situation as we have assessed it. Project JEFERAD is an attempt to do just that. There may be other ways of doing it. We hope, at any rate, to have contributed, with this working paper, some food for serious thought and a base for further discussion.

Thank you, Mr. Chairman.

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Geneva, 13 August - 5 September 1984

AUSTRIA: REVISED PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION RESEARCH AND DEVELOPMENT IN OCEAN MINING (JEFERAD)

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1. On the invitation of the delegation of Austria, informal consultations on the revised proposal for a Joint Enterprise for Exploration Research and Development in Ocean Mining took place at an intersessional meeting at the Palais in Geneva from 2 August to 6. Three meetings were held: on 2 August, p.m.; 3 August, a.m.; and 6 August, a.m.

2. The following 29 delegations participated:

Algeria
Australia
Austria
Colombia
Czechoslovakia
Denmark
Egypt
France
German Democratic Republic
Honduras
India
Indonesia
Iran (Islamic Republic of)
Italy
Ivory Coast
Japan
Kenya
Korea (Democratic Republic of)
Liberia
Madagascar
Malaysia
Mongolia
Romania
Sudan
Union of Soviet Socialist Republics
Viet Nam
Yugoslavia
Zambia
and Namibia (United Nations Council for)

3. The basis of discussion was the Austrian proposal JEFERAD, together with Austrian Working Paper 2, which had been drafted in response to various comments and queries during the spring Session in Kingston and in the intersessional period.

4. The main points raised during the discussion were the following:

(a) Legal competence of the Preparatory Commission

The delegation of Austria suggested that there could be a wider or a narrower interpretation of the provisions in Resolutions I and II touching on the questions of the legal powers of the Preparatory Commission. Ultimately it was a question of political will rather than of legal competence.

/...

(b) The Funding of JEFERAD

The delegation of Austria suggested that the issue should be divided into two parts: (i) establishment of a mechanism through which funding formally and legally could take place; (ii) identification of eventual voluntary contributors willing to make funds available through the established mechanism. A possible way of dealing with (i) was to use the UNDP Revolving Fund for this purpose, and first, informal contacts with the Fund had been encouraging; an alternative might be the establishment of a Special Fund under the Secretary-General, which might be established through Resolution by the Preparatory Commission and Resolution by the General Assembly. Point (ii) should be the responsibility of the Group of Experts which, it was hoped, might be established next year.

(c) Relations, or "nexus", between the Fund and JEFERAD; between the Fund and the Preparatory Commission

The delegation of Austria suggested that the precise definition of these relationships should be part of the mandate, or terms of reference, of the Group of Experts. In any case, the rules of operation of the Revolving Fund are flexible, and the activities of JEFERAD should be organized in such a way as to remain under the control of the Preparatory Commission.

(d) Relations between the Preparatory Commission and JEFERAD

The delegation of Austria suggested that these relations would be analogous to the relations between the Enterprise and the Authority, upon the coming into force of the Convention.

(e) Timing of JEFERAD proposal

The delegation of Austria emphasized that JEFERAD could not possibly be established before the question of overlapping claims had been settled, some pioneers had registered their claims, and sites were made available to the Preparatory Commission for exploration for the Enterprise. It was to be hoped, however, that this situation would have developed by the time of the Third Session of the Preparatory Commission next March/April. If activities in favour of the Enterprise were to move on a line parallel to those of the Pioneer Investors, some decisions as to the framework of such activities would have to be taken during this session.

(f) Phasing of JEFERAD proposal

One delegation suggested the activities of JEFERAD might be phased, in step with the availability of funding. During a first phase, JEFERAD might concentrate on Training, which required relatively modest financial means: while the more costly activities, such as exploration and research and development, might be postponed to a second phase.

The delegation of Austria suggested that, in accordance with the mandate of the Preparatory Commission, a framework should be designed for the most efficient way of organizing training as well as exploration and the transfer or development of technology, but once this framework was established, reality would have to dictate the course of events. If funds were available only for training, to start with, this would be a starting point. If 20 to 30 million dollars a year could be made available as provided in the JEFERAD proposal, the full range of activities could be planned from the outset.

(g) Training

One delegation suggested that management training for the Enterprise should be, above all, profit oriented, and that there was no margin for experimentation and idealism.

The delegation of Austria stressed that the needs of the Enterprise were basically different from those of traditional commercial enterprises; that the Enterprise, and, before it, JEFERAD, was, after all, a first concrete piece of a New International Economic Order, and that its training needs deserved the most careful consideration.

(h) Transition from exploration stage to exploitation stage

Some delegations expressed concern about difficulties that might arise when the Convention comes into force and JEFERAD would have either to be dissolved or transformed.

The Austrian delegation suggested that the case for dissolution should be provided for in great detail in the terms of the JEFERAD Agreement; if, on the other hand, the Enterprise chose to enter into a new Joint Venture with the partners of JEFERAD, this agreement would be based on the Convention itself.

(i) Funding of the Group of Experts

One delegation expressed concern about the funding of the group of experts to be established. It would be difficult for some developing countries to provide extra funds for the work of an expert and his participation in the Preparatory Commission.

The delegation of Austria suggested, that the three experts to be appointed by the Pioneer investors certainly could be paid for by their Governments. The four experts to be appointed by the Preparatory Commission on the other hand could, conceivably be financed by a voluntary contribution from an organization such as IDRC in Canada (International Development Research Centre) which had already expressed interest in this possibility.

5. One delegation drew attention to Article 235 of the EEC Treaty provides that, if an activity of the Community becomes necessary for the attainment of a goal within the context of the Common Market and the required competence is not provided by the Treaty, the Council may, on the proposal by the Commission and after hearing the Assembly, take the required measures by consensus.

6. In summing up, the delegation of Austria stressed that JEFERAD would provide a systemic framework for the implementation of Resolutions I and II with regard to the Enterprise, which was essential if the Preparatory Commission was to fulfil its mandate effectively. JEFERAD had three basic advantages over any other approach discussed thus far:

/...

(a) it ensured the full participation of developing countries right from the beginning, through the interim phase until the coming into force of the Convention;

(b) it offered incentives to the industrialized countries and their companies, in accordance with the Convention;

(c) it opened the most efficient way of ensuring the early entry into effective operation of the Enterprise, without burdening the Enterprise in advance with liabilities and binding decisions.

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ANNEX

REVISED PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION RESEARCH AND DEVELOPMENT IN OCEAN MINING (JEFERAD)

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SUMMARY

Austrian Working Paper 2 is based on the discussion that took place during the March/April portion of the Second Session of the Preparatory Commission, as well as on subsequent consultations, a Memorandum received from the Asian African Legal Consultative Committee, and informal contacts with the Director General of UNIDO and the Director of the United Nations Revolving Fund for Natural Resources Exploration, administered by UNDP.

The Working Paper examines two options for the effective implementation of paragraph 12 of Resolution II, with regard to the exploration of reserved sites, the establishment of a scheme for training, and technology transfer. The first of these options is based on the Secretariat paper, document LOS/PCN/SCN.2/WP1; the second, on the Austrian proposal JEFERAD as contained in document LOS/PCN/SCN.2/L.2. This examination leads to the conclusion that the narrower the interpretation of the legal competence of the Commission, the greater the burden that is shifted to the Enterprise upon the coming into force of the Convention. A wider interpretation, within the spirit and in the context of the history of UNCLOS III, generates an optimum framework for the implementation of Resolutions I and II, ensuring that all measures necessary for the early entry into effective operation of the Enterprise can be taken in a comprehensive and systemic manner and the Enterprise is enabled to keep pace with States and other entities. Failure to take such action during the interim regime would constitute a violation of the parallel system, to the detriment of the Enterprise and the Authority.

The Working Paper gives details about the possibility of the use of the United Nations Revolving Fund for Natural Resources Exploration, administered by UNDP, for financing the operations of JEFERAD. Some alternatives are also suggested. These will require careful consideration by a Group of Experts.

INTRODUCTION

Some Pioneer Investors have filed their applications for registration and allocation of a pioneer area each. A few such areas thus accrue to the Authority for the use of the future Enterprise (para. 2 (b), Resolution II). Two of these sites must be selected and explored under the auspices of the Commission; appropriate technology must be acquired, and the necessary manpower must be trained, if the Commission is to fulfil its mandate of ensuring "that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with States and other entities." (Para. 12, Resolution II).

In this working paper two scenarios are presented. It is assumed that one of the two sites will be covered by the Commission in accordance with document LOS/PCN/SCN.2/WP1; the other is assigned to JEFERAD, in accordance with document LOS/PCN/SCN.2/L.2. Advantages and problems arising from either approach are analysed and compared. A revised JEFERAD proposal (JEFERAD II) concludes the working paper. The operational Procedures and Administrative Arrangements for the United Nations Revolving Fund for Natural Resources Exploration are contained in DP/142/Rev.1 of 10 February 1983.

I.

Document LOS/PCN/SCN.2/WP1 covers all aspects of the mandate of the Special Commission for the Enterprise. It stresses the inextricable links between organizational and operational aspects and between activities focusing on the preparatory phase (interim regime) and activities following the coming into force of the Convention (Convention regime).

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The scope of the mandate and considerations on organizing the work of the Special Commission for the Interim Period are stated in the document as follows:

> "4. According to paragraph 8 of resolution I, the Special Commission for the Enterprise shall:
>
> (a) Take all measures necessary for the early entry into effective operation of the Enterprise; and
>
> (b) Perform the functions referred to in paragraph 12 of resolution II.
>
> 5. Resolution II clearly contemplates that one of the main purposes of the scheme for pioneer investors is to ensure that on the coming into force of the Convention the Enterprise 'will be provided with the funds, technology and expertise necessary to enable it to keep pace with the States and other entities.' (See the preamble to resolution II.)
>
> 6. The stated objective of paragraph 12 of resolution II is 'to ensure that the Enterprise is able to carry out activities in the Area in such a mannner as to keep pace with States and other entities.' The paragraph does not actually refer to functions but to the undertakings of registered pioneer investors and certifying States. Thus, the mandate given in paragraph 8 of resolution I by reference to paragraph 12 of resolution II should be interpreted to mean that it is for the Special Commission for the Enterprise to deal with the questions relating to these undertakings in accordance with paragraph 12, the nature and purpose of which may be regarded as corresponding to 'measures necessary for the early entry into effective operation of the Enterprise.' Consequently, it would be for the Special Commission to make the arrangements for exploration and training referred to in that provision."

Paragraph 4 (a) cited above is open to a wide range of interpretations, to which we shall return below.

Paragraph 4 (b) clearly implies certain responsibilities of the Special Commission with regard to

- exploration of two mine sites for the Enterprise
- training of staff for the Enterprise
- transfer of technology to the Enterprise.

Exploration, under this option, would be undertaken by pioneer investors, at the request of the Preparatory Commission. The cost of exploration - say, a hundred million dollars each - would be passed on to the Enterprise which would have to reimburse the pioneer investors for "the costs so incurred plus interest thereon at the rate of 10 per cent per annum" (para. 12 (a), Resolution II). It should be noted that the decisions of the future Enterprise are thus pre-empted in two ways by the decisions of the Preparatory Commission which, in this way, are binding on the Enterprise:

1. Sites A and B have been selected by the Preparatory Commission for exploration by the respective pioneer investor. Ex post facto, the Enterprise might have preferred to select sites C and D, particularly after knowing the results of exploration of sites A and B. It will still have to pay the costs for sites A and B to the pioneer investors.

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2. On the other hand, if the Preparatory Commission does not make any such request or fails to be operative at all, and exploration of the reserved sites is postponed to the time of the Convention Regime, the Preparatory Commission clearly fails in the fulfilment of its responsibilities to ensure that the enterprise is enabled to keep pace with the States and other entities.

With regard to training, the Preparatory Commission's responsibility is limited limited, in this scenario, to selecting personnel from developing countries for such training. The training itself, under paragraph 12 of Resolution II, is the responsibility of the pioneer investors. One should, however, note a really fundamental question in this context, which the Preparatory Commission certainly will have to deal with: What kind of training? Is the training required by a pioneer investor the same as that required by the Enterprise and the other organs of the authority? If it is different, how can the pioneer investor provide the type of training required by the Author ty? To this we shall return below.

Paragraph 5 of document LOS/PCN/SCN.2/WP1 raises question with regard to funding: Where, exactly, is the line to be drawn between "raising funds," and ensuring that, on the coming into force of the Convention, the Enterprise will be provided with the funds necessary to enable it to keep pace with the States and other entities?

First of all, and in any case, the amount of funding has to be calculated, and this, as LOS/PCN/SCN.2/WP1 points our (paragraph 6) clearly is one of the tasks of the Special Commission.

The next step is to identify the potential sources of funding, in accordance with Article 11 of Annex IV of the Convention. Such sources include (subparagraph (b)) voluntary contributions made by States Parties for the purpose of financing activities of the Enterprise, (subparagraph (e)) other funds made available to the Enterprise to enable it to commence operations as soon as possible and to carry out its functions.

It is possible that there will be a shortfall in the assigned contributions of States Parties to the Enterprise: If the assigned contributions were to be very high, it is possible that many States may postpone ratification. Recourse to subparagraphs (b) and (e) thus may become important.

A narrow interpretation of paragraph 8 of Resolution I precludes any fund raising activity on the part of the Commission.

Does "fund raising" consist only in the final act of transferring funds into an account for the future Enterprise, or does it include approaches to potential voluntary funders "to ensure that the Enterprise will be provided" with such funds?

Similar problems will arise with regard to the procurement of the required technology. The Preparatory Commission may commission, and obtain from the Secretariat, excellent surveys on existing technologies, which may be kept up to date, year by year, until the coming into force of the Convention. Such surveys, although immensely useful, do not ensure, that, upon entry into force of the Convention, the enterprise will be provided with the necessary technology to enable it to keep pace with States and other entities. To ensure this, the Preparatory Commission would have to obtain undertakings binding on Pioneer Investors or other procurers, as well as on the Enterprise.

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It may seem paradoxical, although it is logical: The narrower the interpretation of paragraph 8 of Resolution I, the more the Preparatory Commission will have to impinge on, or pre-empt the decision-making of the future Enterprise. The logic behind the apparent paradox is that action requires decision making based on legal competence. This may either be deemed to reside in the Preparatory Commission, on the basis that "the Commission shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes as set forth in this resolution" (para. 6, Resolution I), or it has to be shifted to the Enterprise. In the first case, the Commission can act, to the best of its ability, to take all measures necessary to ensure the early entry into effective operation of the Enterprise. These necessary measures, in this interpretation, will obviously include the provision of the necessary funds.

The simple logical fact is that legal competence, or decision-making power must strictly correspond to the activities to be undertaken.

(1) $LC_{pr} \approx A_{pr}$

where LC_{pr} = Legal Capacity of the Preparatory Commission and

A_{pr} = the activities of the Preparatory Commission.

If the activities exceed the legal capacity or decision making power the burden is shifted to the future Enterprise.

(2) If $A_{pr} \rightharpoondown LC_{pr}$

then $A_{pr} \approx LC(PR_{0 \to 1} + E_{1 \to 0}$

or (3) $LC_{(pr)(0)} \approx A_{(pr)(0)}$

where PR = Preparatory Commission and E = Enterprise.

If the Legal Capacity of the Preparatory Commission equals 0, its operational capacity with regard to the Enterprise equals 0. This, however, clearly was not the intention of Resolution II. It would defeat the mandate of the Special Commission "to ensure that the Enterprise keep pace with States and other entities." Hence there must be a way out of this dilemma.

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II.

In scenario 2, the legal capacity of the Preparatory Commission, is interpreted in a broad sense - comprehensive enough to enable the Preparatory Commission to "take all measures necessary for the early entry into effective operation of the Enterprise," and these necessary measures are interpreted to include the establishment of a Joint Enterprise for Exploration, Research and Development [JEFERAD] since this offers the most practical and systematic way to implement the essence of paragraph 12 of Resolution II and to fulfil the Preparatory Commission's mandate under paragraph 8 of Resolution I, without preempting the decisions of, and imposing liabilities on, the Enterprise upon the coming into force of the Convention.

JEFERAD would enhance/facilitate

(a) the ability to have exploratory work done effectively as contemplated under paragraph 12, Resolution II;

(b) the institution of a training scheme appropriate to the Enterprise and to the other organs of the Authority;

(c) the appropriate incentives to the industrialized countries and their companies to enter into a joint arrangement for the exploration of the reserved area which might be found useful by the Enterprise upon the coming into force of the Convention;

(d) the participation of developing countries in the operations from the very beginning, thus enhancing their active participation in the Enterprise upon the coming into force of the Convention;

(e) the effective co-development of requisite technologies and their availability to the Enterprise upon the coming into force of the Convention, while leaving the Enterprise free to decide whether it wants to avail itself of this option or choose another one that might be more appropriate;

(f) funding of the preparatory work and promoting prospects of functional and financial viability of the future Enterprise.

We shall examine each of these propositions in turn.

Exploration

One of the reserved sites, chosen by the Commission in agreement with the partners of JEFERAD, would be explored with funds secured in advance, and not chargeable to the future Enterprise as loans.

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Upon the expiration of JEFERAD - five years after its establishment or six months after the coming into force of the Convention, whichever comes first - the Enterprise would be free to enter into a new agreement with the consenting partners of JEFERAD and submit a Plan of Work to the Authority for the subsequent phases of mining, transportation, processing, and marketing. A production authorization would be guaranteed to this new Joint Enterprise for Ocean Mining (JEFORM) in accordance with Article 151, paragraph 5, of the Convention. But the Enterprise would also be free to abandon this option. The assets and liabilities of JEFERAD would be distributed among the partners in accordance with the terms of the JEFERAD Agreement. These will be on fair and commercial terms, and the Agreement will provide for dispute settlement, most likely applying UNCITRAL rules. The Enterprise will also enjoy priority for production authorization for a second mine site, in accordance with paragraph 9 (a) of Resolution II.

Training

Training, clearly has two aspects. The Enterprise needs scientists and technicians, and these can be trained by the Pioneer Investors, in scientific institutions, or by Industry. But the Enterprise, and the Authority, need also managers and decision makers, and they need a different kind of training. It is with regard to this second need that training by pioneer investors may not be appropriate for the Enterprise and the Authority.

It should be noted that even in the established industry there exists today a certain uneasiness with regard to the training for management. Managers and executives are still being trained for the industrial system that existed in the sixties. The curricula of business schools do not reflect the fundamental changes that have taken place in the industrial system during the past two decades. This was emphasized in the recent conference of the Club of Rome (Helsinki, July 1984). As one of the participants, Paulo C. Moura of Brazil, put it:

> "So, the new generation of managers, who were well educated according to the general social expectations and philosophy of the early sixties, perceives itself, in the eighties, as obsolete, unprepared, unprotected ... There is a gap between the social expectation and the business performance ... There are a great number of measures to be taken, if this situation is to be solved ... One thing, however, is very clear from the very beginning: management education has to be redesigned almost everywhere. Economic decision-making is no longer a simple economic or rational question. Business decisions are, in its fundaments, a highly complex process which involves the analysis and consideration of social-cultural-political variables, and those variables are, by definition, external to the business traditional mentality."

The project of the Club of Rome is entitled "The Enterprise in Flux," and it analyses the evolution of the commercial enterprise from a model or paradigm "A" to a model or paradigm "C". The characteristics of this evolution are listed in Table 1, extracted from Howard V. Perlmutter's study, The Symbiotic Enterprise. Global Disorder and the Future of Enterprise. A Report to the Club of Rome.

Table 1. PARADIGMS A, B, C SOCIAL ARCHITECTURE FOR ENTERPRISE

SOCIAL ARCHITECTURAL PARAMETERS	PARADIGM A INDUSTRIAL	PARADIGM B ANTI-INDUSTRIAL	PARADIGM C SOCIETAL
1. MISSION - Objectives	Profitability (Viability)	Public Acceptance (Legitimacy)	Profitability and Public Acceptance (Viability and Legitimacy)
- Geopolitical NORTH-NORTH	Mercantilist	Autarkic	Symbiotic Interdependence
NORTH-SOUTH	Trickle down paternalism	Self-reliance	Parity and Partnership
EAST-WEST	Submergence	Divergence	Emergence Trans-ideological
- Roles	Mainly: Economic Political	Social Ecological	Economic Social Political Ecological
2. GOVERNANCE			
- Ownership	Private or State (Command)	Collective (Co-operatives)	Autonomy and Multistakeholder negotiation
- Composition of Board	Professional	Some Stakeholders (Workers, Consumers)	Societal (Including Wealth Creation)
3. STRATEGY Market	Dominance	Self-reliance	Niches in Societal Development
Competition/ Co-operation	Going it Alone	A Collective/ Going it Alone (Internal Co-operative)	Autonomy and Multi-enterprise Co-operation and Coalition (Symbiotic/ Parity)

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SOCIAL ARCHITECTURAL PARAMETERS	PARADIGM A INDUSTRIAL	PARADIGM B ANTI-INDUSTRIAL	PARADIGM C SOCIETAL
Geopolitical	Industrialized Focus	Developing	Both Industrialized and Developing
4. ORGANIZATION CHARACTER			
- Internationality	Ethnocentric	Polycentric	Geocentric Integrative
- Management Style	Authoritative	Democratic	Synarchic Strategic
- Values	Materialistic	Anti-materialistic	Quality and Quantity Human Progress (Social and Economic Wealth)
- Individual	- Efficiency > People	- Efficiency < People	- Efficiency and People
	- Responsibilities	- Rights	- Rights/ Responsibilities
5. ORGANIZATION STRUCTURE (Socio-technical)			
- Technology	High (Hard)	Low (Soft)	Wide range of Technologies
- Authority	Hierarchical Vertical Bureaucratic	Horizontal/ Debureaucratic	System and Network (Synarchic)
- Evaluation	Performance Related to Viability	Performance Related to Legitimacy	Performance Related to Viability and Legitimacy
- Rewards	Material Status	Social	Pluralistic and Societal
- Communication	Centralised	Shared internal	Shared Internal and External Multi-centred
- Identification (Basis for)	Performance Related	Collectivity	Mission-Related

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The Enterprise of the International Seabed Authority and JEFERAD definitely belong to paradigm C, and traditional training for paradigm A simply will not do. To institute a training scheme, the Prep.Com. therefore should design a curriculum responding to its very special needs. Such a curriculum could be designed by a small group of experts including representatives from all the stake-holders in the Enterprise and its joint ventures: pioneer investors; mining companies; land-based producers; potential miners; consumers; scientists and environmentalists. It could enlist the services of an organization like the International Management Institute (IMI) in Geneva and the International Ocean Institute (IOI) in Malta, which is specialized in curricula of just this kind. We recommend that such training programmes should be planned to run for ten weeks each, and that they should be initiated in 1985. Not only managers, but also the future scientific and technical trainees - every person working for the future Authority - should go through such a programme to ensure the harmonious functioning of the new institution with all its challenges and aspirations. The funding necessary for the implementation of such a training programme is included in the budget for R&D as presented in the original JEFERAD proposal.

Incentives to Industrialized Countries

The JEFERAD proposal stipulates that the investment cost for exploration, research and development be divided between the Commission, interested pioneer investors, the Governments of interested industrialized States and companies or consortia, and interested developing countries. This investment, for a period of five years, for exploration, R&D only: Not for the subsequent phases of mining, transportation, processing and marketing, is projected as between 200 million and 300 million. Half of this cost would have to be raised by the Commission, that is, between 20 and 30 million dollars per year; the other half would be divided between those States signatory to the Convention and those companies sponsored by them that may wish to participate in JEFERAD, on a purely voluntary basis, and because they are attracted by the incentives offered. The main incentive would be that their own investment would be reduced quite considerably. JEFERAD would offer them a unique opportunity to carry on the work in which they invested so heavily in the 1970s, and which all but dried up in the 1980s due to the lack of risk capital. At a time when risk capital is very hard to come by, this is a strong incentive. No other arrangement could offer this incentive, which, at the same time, however, also takes care of the exploration of the reserved area.

Participation of Developing Countries

Very few developing countries would be ready to invest money in deep seabed mining at the present time. At this time of global economic crisis, with starvation rampant in large parts of the planet, ocean mining necessarily has a very low priority. Yet, participation in the Enterprise and in the decision-making processes of the Authority is one of the hard-won advantages gained by the Third World during the long years of UNCLOS negotiations.

JEFERAD offers to developing countries the possibility of entering as equal partners in the management of a high-tech venture with nominal cost to them: since it is the Commission that would have to come up with the money - in a form to be discussed below - and which would, therefore, be in a position to appoint

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half of the members of the Board of Directors, or Joint Enterprise Committee (JEC). The Commission would choose these members from developing countries which apply for participation. These should include, above all

(a) land-based producers;

(b) coastal States intending to mine mineral resources in their own EEZs, who would benefit greatly from the JEFERAD experience;

(c) potential future deep-sea miners;

(d) regional enterprises, if they come into being.

A nominal participation contribution might be paid by interested developing countries either individually or on a group basis.

There is no other way of ensuring the participation of developing countries during this interim phase.

Co-development of Technologies

Careful legal work is needed on this aspect of JEFERAD, which must be spelled out in great detail in the JEFERAD Agreement.

The case is relatively simple if it could be assumed that, upon the entry into force of the Convention, the Authority, the Enterprise, and the other partners of JEFERAD agree that it would be most useful and practical to renew the agreement, with the Enterprise succeeding to the rights of the Commission.

There is an interesting precedent in research and development in space technology. INTERCOSMOS has been established for the joint development of scientific instruments and service systems and their integration into satellites, for joint research, experimental design development methodology and joint analysis of data. Scientific results of joint experiments form a common asset of all partners involved and are accessible to the international community.

In his Special Report to the General Conference of UNIDO IV, the Executive Director indicated UNDIO's interest in establishing an International Centre for Marine Industrial Technology, somewhat along the lines of the recently established Institute for Bio-industries, with headquarters in Trieste and New Delhi.

The International Centre for Marine Industrial Technology could be structured, with the necessary adaptations, like CERN (European Centre for Nuclear Research) or IIASA (International Institute for Applied Systems Analysis), or it could be decentralized, with branches in several regions. Such a Centre would deal with research and training in fishing and shipping technologies, technologies for the extraction of energy from the oceans, oil and gas exploration and exploitation technologies, and ocean mining technologies. In the sector of ocean mining technologies it would co-operate with the Ocean Economics and Technology Branch of the United Nations Secretariat (OETB). The technology bank, establishment of which is suggested in the

JEFERAD proposal, could be considered a first piece of an International Centre for Marine Industrial Technology and, at a later stage, be connected with it. There is no other practical way of achieving this kind of technology transfer and co-development.

Some suggestions with regard to the establishment of the Technology Bank will be presented in Austrian Working Paper III at the next Session of the Preparatory Commission.

If, on the other hand, JEFERAD is dissolved upon the coming into force of the Convention, its assets must be distributed among the partners, and the provisions relating thereto will have to be detailed in the JEFERAD Agreement, on the basis of fair, commercial criteria. There also would have to be a provision for settlement of any disputes, probably by recourse to UNCITRAL rules.

Funding

If the usefulness of the JEFERAD approach is agreed on, a way must be found to escape from the dilemma described on page 7 of this working paper.

The Preparatory Commission must be able to be operative with regard to the future Enterprise to the same degree it is operative with regard to the pioneer investors. This, undoubtedly, is the intention of Resolutions I and II as interpreted in the context of the history of UNCLOS III. If no action at all were to be undertaken by the Preparatory Commission during the interim regime, the parallel system would be violated, to the detriment of the Enterprise and the Authority.

Bearing in mind the counsel of those who have expressed doubts that the Preparatory Commission, established, as it is, by a Resolution of UNCLOS III, has the requisite legal personality and power to enter into contracts or to raise funds, a practical way out will have to be found.

The financing of the operations of JEFERAD will require contributions by all participants therein, i.e. the Preparatory Commission, the pioneer investors, the industrialized States and their companies, and the developing States. As regards the contributions by the Preparatory Commission and developing States, a solution may perhaps lie in the establishment of a Revolving Fund with legal personality. Such a Fund could be established by Resolution of the Preparatory Commission and Resolution by the General Assembly, as was done in the case of the United Nations Revolving Fund for Natural Resources Exploration.

There are indeed so many points in common between this Fund and the kind of fund needed for JEFERAD that one might even examine and seriously consider the possibility of using the existing Fund for our purpose.

The Fund, as stated in the Introduction to the quoted document, "is a unique venture and is largely devoted to exploration activities involving a high element of risk and uncertainty". Hence, "the Fund's procedures and arrangements are, of necessity, flexible." There is nothing in the document

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that would prevent the Fund from including seabed minerals in its exploration activities. The services of the Fund are exclusively in the exploration and associated pre-investment fields, broadly defined, including the exploration of solid minerals. They provide opportunities for on-the-job training of nationals, transfer of technology and utilization of national institutional facilities to the extent that these contribute to the expeditious execution of the project as determined by the management of the Fund.

The Fund utilizes voluntary contributions and funds generated through the production of resources discovered or developed with the assistance of the Fund, (i.e., replenishment contributions). In carrying out its mandate the Fund may also accept donations and advances in cash or kind, from intergovernmental and non-governmental institutions, co-financing by governments, international financial institutions and public and semi-public institutions, with the agreement of the recipient country.

Replenishment Contributions to the Fund for exploration projects are not intended to be repayments of loans but rather to provide the Fund, from its successful projects, with a share of the proceeds from resulting production. This is expected eventually to make the Fund revolve.

Replenishment Contributions from user countries for solid minerals exploration projects shall be levied at the uniform rate of 2 per cent of the annual value of produced commodities, or 1 per cent for least developed countries, and shall be payable at this rate for a period of 15 years from the start of commercial production or until a ceiling of 10 times total project costs at constant prices is attained.

It would appear that the Operational Procedures and Administrative Arrangements would allow the Fund to assist the Commission and the developing countries wishing to participate in JEFERAD.

The capital contributed by the Fund would be risk capital, not a loan. Should JEFERAD be dissolved upon the coming into force of the Convention, no liability would have been incurred by the Enterprise. Should the JEFERAD agreement be renewed, with the Enterprise entering as a partner, and the operation be successful, leading to mineral production, then the new Joint Enterprise for Ocean Mining [JEFOM] will make replenishment contributions to the Fund which might be agreed to be 1 per cent of production value for 15 years, starting the year of the beginning of commercial production. Such replenishment contributions to the Revolving Fund could be justified on the grounds that (a) such contributions would not amount to a repayment of loans but would be a voluntary contribution for assistance rendered to the Preparatory Commission at an earlier stage; (b) the payment might be less than the payment due under paragraph 12 (a) of Resolution II, and (c) the payment would be used for operations of the Fund in the interests of developing countries, and would therefore amount to revenue sharing with developing countries. These aspects could also be embodied appropriately in an Agreement between JEFERAD and the Revolving Fund. The payment for a "feasibility study" by the Fund will be for services rendered.

This question should be studied by the Group of Experts the Commission should appoint as suggested by the JEFERAD proposal, in co-operation with the Director of the Fund and the Legal Adviser.

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Should the Group of Experts come to the conclusion that the Fund is not competent to enter into a Project Agreement or other agreement with JEFERAD, the Fund would serve nevertheless as a most useful precedent, and a Special Trust Fund, under the Secretary-General of the United Nations, might be established by Resolution of the Commission and of the General Assembly.

Thus, if the Commission decides that JEFERAD provides the most efficient framework for the effective implementation of paragraph 12 of Resolution II, and to ensure the early entry into effective operation of the Enterprise and its keeping pace with States and other entities in an efficient parallel system, a legal modus operandi can be found for the financing of JEFERAD, either through the United Nations Revolving Fund for Natural Resources Exploration, or through a Special Trust Fund under the Secretary-General, or through some other institutional arrangement for utilizing the voluntary contributions by States and international institutions.

Other issues

Seat: The seat of JEFERAD should be the seat of the Authority.

Applicable Law: The applicable law should be international law, the Convention, and the law of Jamaica.

Confidentiality of data: Paragraph 3 of Resolution II provides that, in dealing with exploration data, the Commission and its staff shall act in accordance with the relevant provisions of the Convention and its Annexes concerning the confidentiality of data. Article 14(3) of Annex III to the Convention provides that "data on the reserved areas may be disclosed to the Enterprise. Such data transferred by such persons to the Enterprise shall not be disclosed by the Enterprise to the Authority or to anyone external to the Authority."

JEFERAD acts on behalf of the Enterprise. It is assumed, therefore, that it has the same privileges and the same obligations, with regard to confidentiality of data, as the Enterprise.

Group of Experts: Terms of Reference. Austrian Working Paper 1 suggested the establishment, in due time, of a Group of Experts, having specialized knowledge or practical experience in the fields covered by the proposal, to examine the modalities for the establishment of JEFERAD, prepare a draft arrangement or memorandum of understanding for JEFERAD, and make such other recommendations relating to its operations as they consider relevant and appropriate. It was suggested that this Group of Experts be composed of three experts nominated by Pioneer investors and four experts nominated by the Commission.

The broad terms of reference of the Group of Experts may include, *inter alia*:

1. Mode of establishment of JEFERAD.

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2. Examination of the budget and exploration of possible sources of financing.

3. Examination of possible relations with the Revolving Fund, or the desirability of establishing a separate Special Fund, and the modalities thereof.

4. Establishment of a training scheme.

5. Establishment of a Technology Bank.

6. Examination of the question of confidentiality of data.

EXECUTIVE SUMMARY

IN THE FORM OF A DRAFT RESOLUTION

(REVISION I)

The Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea,

Conscious of its functions and purposes during the interim period between the signing of the United Nations Convention on the Law of the Sea, 1982, and its entry into force;

Desirous to encourage investments by States and other entities in a manner compatible with the international regime set forth in Part XI of the Convention and the Annexes relating thereto, before the entry into force of the Convention, and as set forth in Resolution II;

Recognizing that the Enterprise must be provided with the funds, technology and expertise necessary to enable it to keep pace with the States and other entities during the interim period;

Recalling that Resolutions I and II give to the Preparatory Commission the mandate to take all measures necessary for the early entry into effective operation of the Enterprise;

Conscious of the need to take adequate preparatory steps in this direction and to concentrate its activities in the Area in the interim period on exploration, research, and development, data management, and training,

On the recommendation of its Special Commission for the Enterprise,

Decides as follows:

1. The Preparatory Commission intends to enter into a joint venture arrangement with States and other entities for the exploration, research and development of either the first, or, at its option, the second or the third reserved area accruing to it from the application of a pioneer investor under Resolution II.

2. The joint venture arrangement referred to in paragraph 1 may be designated as Joint Enterprise for Exploration, Research and Development, hereinafter called JEFERAD.

3. Partners in JEFERAD should be States signatories to the United Nations Convention on the Law of the Sea, 1982, and entities whose components being natural or juridical persons possess the nationality of one or more States signatories to the Convention or are effectively controlled by one or more of them or their nationals, and are able and willing to contribute, in cash or in kind, to the establishment and operation of JEFERAD.

4. The participation of Partners in JEFERAD should be on fair and reasonable terms and conditions.

5. The Preparatory Commission shall be entitled to a share of 50 per cent in the capital funds of JEFERAD.

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6. The Partners should establish a Joint Enterprise Committee for managing and supervising the activities of JEFERAD. Participation and voting in the JEC should be based on the Partners' contribution to JEFERAD. The Preparatory Commission should appoint half of the members of the JEC, keeping in mind the interests of developing countries.

7. The activities of JEFERAD should be:

(a) the exploration of the ocean floor and deposit evaluation;

(b) research and development in mining technology, transport and processing, through

- (i) the establishment of a technology bank;
- (ii) the testing of mining systems or the development of new concepts of mining systems;

(c) Training, through

- (i) short, interdisciplinary foundation courses, for all trainees;
- (ii) a scholarship programme for 1-2 years' specialized technical training, in co-operation with the pioneer investors;

(d) Preparation for the establishment of an Institute for Training, Research and Development as part of an International Centre for Marine Industrial Technology.

8. JEFERAD should be established for a period of five years, extendable by one year at a time by a decision of the Preparatory Commission on the recommendation of the Partners. If the Convention comes into force before the expiration of JEFERAD, JEFERAD should terminate its activities within six months from the entry into force of the Convention. If within this period, the JEC of JEFERAD proposes a plan of work to the Authority, it should be considered and given priority in accordance with the provisions of Resolution II and the Convention. The Enterprise will, in that event, succeed to the position and the rights of the Preparatory Commission in JEFERAD, and a new arrangement, to the extent necessary, may be concluded between the willing partners of JEFERAD. The participation of partners in JEFERAD in the new Joint Enterprise for Ocean Mining (JEFOM) shall continue to be on fair and reasonable terms and conditions.

9. A Group of Experts, having specialized knowledge or practical experience in the fields covered by this Resolution, is hereby established. The terms of reference of the Group of Experts will be as follows:

(a) to examine the modalities of the establishment of JEFERAD, including the preparation of a draft agreement for this purpose;

(b) to examine the budget of JEFERAD and explore the possible sources of financing its operations;

(c) to examine the possible relations between JEFERAD and the UNDP Revolving Fund, or the desirability of establishing a separate Special Fund, and the modalities thereof;

/...

(d) to examine the establishment of a training scheme and make recommendations thereon;

(e) to examine the establishment of a Technology Bank; and

(f) to examine other matters relating thereto and make such recommendations as they consider relevant and appropriate.

The Group of Experts shall be composed as follows:

3 Experts nominated by Pioneer investors;

4 Experts nominated by the Commission.

Members of the Group of Experts shall be paid by their Governments, unless the Preparatory Commission can cover their cost from voluntary contributions. The administrative and maintenance expenses during the period of discussions in the Preparatory Commission or its Special Commission shall be borne by the United Nations.

The Group of Experts shall submit its report within a period of six months from the date of this Resolution.

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CONVENTION ON THE
LAW OF THE SEA

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Geneva, 13 August - 5 September 1984

AUSTRIA: REVISED PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION RESEARCH AND DEVELOPMENT IN OCEAN MINING (JEFERAD)

Corrigendum

1. Page 2, paragraph 2:

For 29 read 28

For Korea (Democratic Republic of) read Democratic People's Republic of Korea

Delete Malaysia

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Geneva, 12 August - 4 September 1985

AUSTRIA: EXECUTIVE SUMMARY OF REVISED PROPOSAL FOR A JOINT ENTERPRISE FOR EXPLORATION, RESEARCH AND DEVELOPMENT IN OCEAN MINING (JEFERAD)

The revised proposal for a joint enterprise for exploration, research and development in ocean mining (JEFERAD) examines the Memorandum on the Austrian Proposal before the Preparatory Commission for the International Sea-Bed Authority, tabled by the Asian-African Legal Consultative Committee Secretariat (AALCC) last year, in the light of recent developments.

While fully approving the purposes of JEFERAD, that Memorandum questioned the legal capacity of the Preparatory Commission to proceed in the manner proposed by the original Austrian proposal contained in LOS/PCN/SCN.2/L.2 and suggested an alternative mode of establishment.

In the present situation, the AALCC alternative has a number of important advantages. The revised JEFERAD proposal suggests how these could be utilized, and comes to the following recommendations to establish JEFERAD through a phased process, trying to merge the advantages of the original Austrian proposal with those of the AALCC alternative.

Step 1: Immediate completion of the rules and regulations for registration. Registration of the Pioneer Investors whose claims are non-controversial, there being no overlapping claim.

Step 2: The registered Pioneer Investor could form a partnership with other pioneer investors or other entities of States signatories to the Convention, for exploration, research and development.

Step 3: The Preparatory Commission associates itself with the JEFERAD partnership in the following ways:

(a) It enters into agreements with JEFERAD for the exploration of the reserved mine site accruing to the Preparatory Commission from the registration of the Pioneer Investor as well as for training of personnel and for technology transfer - all in accordance with paragraph 12 of Resolution II;

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(b) It establishes a JEFERAD Committee, composed of Pioneer Investors and others to be nominated by the Commission to supervise the implementation of paragraph 12 of Resolution 12;

(c) It inserts into the agreement an option for the Enterprise to enter into the JEFERAD partnership upon the coming into force of the Convention, on the basis of the acquisition of 50 per cent of the shares.

Step 4: (to be taken upon the entry into force of the Convention and the establishment of the Enterprise) Enlargement of the capital of the JEFERAD partnership; establishment of a joint venture with the Enterprise; submission of a plan of work to the Authority. Step 4, of course, is not mandatory. The Enterprise is quite free to take it or not to take it. It is an option. There can be no doubt, however, that it is in the best interest of the Enterprise and of the JEFERAD partnership to take it.

This alternative mode of establishment of JEFERAD has three major advantages. It eliminates the difficult problem of the legal competence of the Preparatory Commission, because it is not the Commission that establishes JEFERAD, it is the Registered Pioneer Investor who would have to take the initiative. Secondly, the problem of financing is of a quite different kind in this setting: it can be handled in a purely commercial way by the JEFERAD partners themselves. The injection of public international funding comes only at the time when the Convention is in force and the Enterprise has been provided with funds which will enable it to enter into a joint venture.

The initial relative independence of the JEFERAD partnership has the additional advantage that the terms of reference with regard to R and D can be broad and in accordance with changing circumstances so as to make JEFERAD competitive with the most advanced industries. Such terms of reference may include exploration for cobalt crusts and polymetallic sulphides and the development of the requisite technologies which recently have become the focus of attention of governments and industries in the industrialized countries. Such advanced R and D in ocean mining technology would certainly benefit the Enterprise at a later stage in the exploration and exploitation of the Common Heritage of Mankind which comprises far more than just manganese nodules.

The revised JEFERAD proposal expresses the deep concern of the Austrian Delegation about the delay in the registration of the Pioneer Investors. It points out that the régime prescribed by Resolution II is the first, and very important phase of the deep sea-bed mining régime contained in the United Nations Convention on the Law of the Sea. If Resolution II cannot be applied, i.e., if no Pioneer Investors are registered, such a situation might have serious consequences for the deep-sea mining régime. The ratification process might be delayed, important countries from all regions of the world might decide not to ratify, and if the Convention does not enter into force in the foreseeable future, the "Provisional Understanding" between the eight industrialized States would constitute the only international agreement on deep-sea-bed mining in force and applied.

The revised JEFERAD proposal suggests that the registration of the one pioneer investor whose claim is non-controversial is an absolutely crucial countermeasure against this trend of developments. It would establish a fact. It would enable the Preparatory Commission to discharge its operational responsibilities. By setting a new context based on legal facts and realities, it might even hasten a solution to the problems presently blocking the registration of the other pioneer investors.

The revised JEFERAD proposal builds on the assumption of this scenario which it considers the only realistic one.

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2 April 1984

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Preparatory Commission for the International
Sea-Bed Authority and for the International
Tribunal for the Law of the Sea
Special Commission 2

Note by the Chairman on the General Exchange of Views

1. Following upon the adoption of its Programme of Work (LOS/PCN/SCN.2/CRP.1) at its second meeting on 21 March 1984, the Special Commission held a general exchange of views on the Enterprise, ending at its fourth meeting on 28 March 1984. The basic documents for this purpose were the Statement of the Chairman (LOS/PCN/SCN.2/L.1) and the background paper by the Secretariat on the Mandate and Programme of Work of Special Commission 2 (LOS/PCN/SCN.2/WP.1 and Add.1). During the three meetings, time was also devoted to preliminary comments on the proposal of Austria for a Joint Enterprise for Exploration Research and Development in Ocean Mining (LOS/PCN/SCN.2/L.2).

2. Most delegations were of the opinion that economic considerations would dominate planning and preparatory measures for the Enterprise in view of the current state of the world economy, conditions in the mining sector, and predictions as to when sea-bed mining would become commercially viable. The ability of the Enterprise to acquire or attract the necessary funds and technology would be dependent on such general economic conditions. Attention was also drawn to the need to take account of a possible substantial shortfall in the initial funding of the Enterprise and the serious financial consequences that would have for States Parties to the Convention and for the operations of the Enterprise. Strong emphasis was consequently placed on adopting pragmatic and realistic approaches to the work of the Special Commission and on ensuring that flexibility is built into its recommendations for the Enterprise.

3. Most delegations addressed their remarks to operational aspects, and particularly to the initial operations of the Enterprise. There was, however, a difference of emphasis in interpreting the mandate of the Special Commission

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as concerns ensuring "early entry into effective operation" (paragraph 8 of resolution I): some would limit the planning process to initial operations; others would extend that process to ensure that recommendations also satisfied requirements for longer-term development. In this same connection, a doubt was raised as to the feasibility of planning on the basis of the two initial mine sites allocated to the Enterprise under resolution II.

4. The fact that the Convention permits the Enterprise to exercise a number of options as to the scope and type of operation it can conduct was duly noted, and the question of the most logical sequence for the study of operational options was addressed in most of the interventions. A clear preference was expressed for an early emphasis on the Joint Venture approach to the initial operation of the Enterprise. At the same time, it was noted that the Special Commission must be careful to ensure that all operational options were fully evaluated and done, moreover, according to various economic scenarios that might be devised since current conditions could not be accepted as the only basis for establishing the relative feasibility of the different options permitted under the Convention. Over-emphasis on joint ventures should also be avoided, it was argued, on the grounds that appropriate partners might not be forthcoming, in which case contracting would become the more feasible option.

5. Joint arrangements, particularly joint ventures, were considered to be an important element of the operational system for the Enterprise by virtue of the continuous interest shown in the joint venture approach in the negotiations of the United Nations Conference on the Law of the Sea. Several delegations were of the opinion that under present conditions and predictions a joint venture approach to the initial operation would virtually be mandatory. Others, in addition, pointed to the advantages they saw in the incentives that could be offered to the joint venture partners of the Enterprise (with reference to Annex III, article 13, paragraph 1, of the Convention) and to the avoidance of compulsory transfer of technology (with reference to Annex III, article 5, paragraph 6, of the Convention).

6. Some general principles with respect to a joint venture of the Enterprise were offered in the course of the exchange:

(a) It must involve experienced mining entities, having tested technology and financial security,

(b) It must ensure early entry into effective operation;

(c) It must ensure development of an independent capability;

(d) It must provide for the participation of developing countries on a priority basis,

(e) It must not be the means for creating a monopoly of activities in the Area,

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(f) It must ensure that no group of countries can dominate the Enterprise.

7. As to organizational aspects, emphasis was placed on the establishment of an organization of minimal size and structure, capable, however, of responding quickly to the emergence of favourable operating conditions. The Special Commission would face a major task in the elaboration of the Statute of the Enterprise (Annex IV of the Convention). While its structure and powers will be derived directly from the Statute, questions of the initial size and scope of activities will only be answered in the context of the work undertaken on operational aspects.

8. Various references were made in the course of the general exchange to the interrelationships that would exist between the work of Special Commission 2 and that of other bodies of the Commission. One such example, not already listed in LOS/PCN/SCN.2/WP.1, was that of determining the scope of the exploratory work that might be undertaken under paragraph 12 of resolution II.

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TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 2
Fourth session
Kingston, Jamaica
17 March-11 April 1986

TRAINING

Suggestions by the delegation of Malta

1. The delegation of Malta has the honour to draw the attention of Special Commission 2 to the work of the International Ocean Institute and to the opportunities that can be provided by the Institute in respect of training for the Enterprise.

2. For the past six years the International Ocean Institute (IOI) has conducted sixteen training programmes in the management and conservation of marine resources for mid-career civil servants of developing countries. These courses are broadly interdisciplinary, based on the awareness that the problems of the oceans are closely interrelated and need to be considered as a whole. The purpose of the courses is to assist developing countries in forming cadres of civil servants needed for the drafting of national legislation, the building of national infrastructure, to formulate marine policy, and to represent their governments in negotiations within international organizations or with foreign companies. Some three hundred participants have completed IOI programmes in various parts of the world, and IOI has raised a total of about $3 million thus far to provide scholarships.

3. One of the annual programmes, Class A, is devoted in particular to all aspects of ocean mining. It is held in the Spring at the IOI headquarters in Malta. For the technical part, the IOI has co-operated with the Technical University of Aachen and will, in future, co-operate with IFREMER, France.

4. The IOI would like to draw the attention of the Preparatory Commission especially to this latter programme which, with some adjustments in accordance with suggestions the Preparatory Commission itself might make, would respond to some of the training needs felt by this Commission. What we propose, in accordance with our standard format, is an introductory course of about 10 weeks, specially designed for mid-level managers. Its purpose would be to create in developing countries a pool of expertise of persons up-to-date in the latest developments in deep-sea exploration, research and development as well as in the economics of ocean mining and the methodology of high-tech management. While it obviously would be premature to train specific persons for specific positions in the future Enterprise and no assurance whatsoever should be implied with regard to future employment by the Enterprise, the generation of such a pool of expertise can only be beneficial and enhance industrial development and the transfer of technology in developing countries.

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5. The programme would have no financial implications for this Commission. As in the case of all other courses, the IOI would assume the responsibility for raising the needed scholarships, especially for participants from developing countries.

6. Candidates for participation and scholarships should be nominated by the Governments of States members of the Preparatory Commission.

7. If this proposal were to be of interest to this Commission, the Commission should request the Secretariat to facilitate the necessary preparations. In particular, the Commission might, during the resumed session later this year, organize a colloquium during which a draft syllabus would be submitted and suitable additions or modifications might be suggested. The colloquium should be attended by training experts of the IOI, of the Secretariat, and by interested delegates. The purpose of the colloquium would be to design a curriculum that would exactly respond to the needs and concerns of the Commission and to arrange details as to the dates, duration, venue, of the programme.

8. In accordance with past experience, the IOI suggests that the programme should include, but not be restricted to, the following items:

(a) Introduction to oceanography: state of the art. Importance of oceanography for exploration and exploitation; time on a research vessel;

(b) Introduction to the sea-bed mining régime as contained in the United Nations Convention on the Law of the Sea: opportunities, challenges, and responsibilities;

(c) Ocean mining technology: state of the art; future trends;

- exploration
- mining
- transporting
- processing

field trips and visits to laboratories.

- access to information;

(d) The economics of the Common Heritage. Economic and environmental aspects of ocean mining;

(e) High-technology management;

(f) Negotiating techniques;

(g) Simulation exercises.

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9. The IOI would accept 25 participants for each ten-week programme.

10. Participants who have completed the ten-week introductory programme might desire to follow up with a one-year or more-year specialized programme. The IOI would do everything possible to find scholarships for such persons to continue and deepen their studies.

11. The proposal to the Preparatory Commission to utilize the IOI Training Programme should in no way be construed as a substitution for, or interference with, the responsibilities of the Pioneer Investors under Resolution II.

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Special Commission 2
Fourth session
Kingston, Jamaica
17 March-11 April 1986

Algeria, Austria, Egypt, Indonesia, Kuwait, Malta, Morocco, Nigeria, Senegal, Somalia, Suriname, Tunisia and Yugoslavia: draft resolution

The Preparatory Commission,

Bearing in mind the responsibilities accruing to this Commission under resolutions I and II for the early entry into effective operation of the Enterprise,

Recognizing that training, transfer of technology and exploration are among the essential means to achieve this end,

Aware of the responsibilities of the pioneer investors in these matters, upon their registration in accordance with resolution II,

1. Takes note of the offer made by the International Ocean Institute and contained in document LOS/PCN/SCN.2/L.4, introduced by the delegation of Malta;

2. Notes also that the proposal for training has no financial implication for the Preparatory Commission;

3. Calls upon Governments of developing countries members of this Commission to take advantage of the offer by nominating candidates for participation and scholarships in the programme;

4. Decides that a colloquium be organized during the summer meetings of the Preparatory Commission later this year to review the curriculum and syllabus for such programmes;

5. Expresses its appreciation to the International Ocean Institute for its constructive contribution to the work of the Preparatory Commission.

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Special Commission 2
Fourth session
Kingston, Jamaica
17 March-11 April 1986

Algeria, Austria, Egypt, Indonesia, Kuwait, Malta, Morocco, Nigeria, Senegal, Somalia, Suriname, Tunisia and Yugoslavia: draft resolution

Addendum

Add the following countries to the list of sponsors of the draft resolution:

Congo, Liberia and Zaire

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21 July 1989

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PREPARATORY COMMISSION FOR THE INTERNATIONAL
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TRIBUNAL FOR THE LAW OF THE SEA
Special Commission 2
New York, 14 August-1 September 1989

DRAFT PRINCIPLES, POLICIES, GUIDELINES AND PROCEDURES FOR A PREPARATORY COMMISSION TRAINING PROGRAMME

Pursuant to resolution II, paragraph 12 (a) (ii), the Preparatory Commission hereby establishes a Training Programme for the interim period which will be carried out in the context of pioneer activities, as defined in resolution II, paragraph 1 (b).

The principles, policies, guidelines and procedures governing the Programme will be as follows.

1. Principles

1.1 Training must be planned and carried out in close co-operation between the registered pioneer investors and, as appropriate, the Certifying States on the one hand and the Preparatory Commission on the other.

1.2 Training must ensure the ability of the Enterprise not only to carry out activities in a timely manner but also to keep pace with States and other entities operating in the Area.

1.3 Training must cover all levels and aspects of sea-bed mining activities.

1.4 Training must aim at helping the Enterprise to recruit a sufficient number of personnel of high qualifications and technical competence.

2. Policies

2.1 In furtherance of the principle set forth in paragraph 1.1, the Preparatory Commission will establish a Training Panel to plan and carry out the Programme.

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2.2 The Programme will provide training in all the different disciplines and skills required by the future Enterprise, to the same extent and level that these disciplines and skills are practised by the registered pioneer investors.

2.3 The Programme will incorporate, as and when appropriate, both general and specialized training, and both theoretical and practical training. The training methods and facilities used by each registered pioneer investor, including those with a technological component, should be the best available to it. Where training or a component of the training provided is to be undertaken in universities or research institutions, these must be widely recognized in the country concerned.

2.4 The Programme will give initial priority to training in surveying and exploration, and assessment of the results thereof.

2.5 The Programme will aim at maximum cost-effectiveness and the achievement of an appropriate balance as between its qualitative and quantitative requirements.

2.6 Implementation of the Programme will be scheduled in such a way as to maximize the value and timeliness of the knowledge and experience gained by trainees, relative to the date of establishment of the Enterprise. Pioneer investors will, after their registration and at set intervals thereafter, advise the Preparatory Commission of the training opportunities arising out of their pioneer activities. They will also advise the Preparatory Commission of the financial implications of their proposed training schedules.

2.7 All signatories to the Convention will be entitled to nominate candidates for training.

2.8 Selection of candidates will represent designation by the Preparatory Commission in accordance with resolution II, paragraph 12 (a) (ii), and will be done bearing in mind the need to ensure both the highest possible standards and equitable geographical distribution amongst persons designated to receive training. As appropriate, designated trainees may undergo more than one period of training and may also receive training from more than one registered pioneer investor.

2.9 Traineeships will not, in principle, be awarded for the pursuit of academic studies leading to degrees or diplomas. Rather, they are intended to give persons the opportunity to extend their professional or technical knowledge and experience to areas applicable to future sea-bed mining and to acquaint them with advanced methods and techniques currently used by registered pioneer investors.

2.10 Registered pioneer investors shall submit to the Preparatory Commission reports on each person trained, including a full description of the training provided and the context in which it was carried out.

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2.11 The Programme will require that Governments of trainees give assurances to the Preparatory Commission that the persons concerned will be appropriately reabsorbed in their professions or employed in related fields. These Governments will also be required to co-operate in making trained persons available to the Enterprise at its request and, in the interim period, to the Preparatory Commission should it require the services of these experts.

2.12 The Programme will require that the Preparatory Commission, the trainees selected and their Governments co-operate in observing the procedures and formalities required by the States receiving the trainees.

3. Guidelines and procedures

3.1 The Training Panel

3.1.1 The Training Panel will recommend to the Preparatory Commission the measures to be taken pursuant to the principles and policies established for the implementation of paragraph 12 (a) (ii) of resolution II.

3.1.2 The Panel shall consist of 15 members who are experts in appropriate fields. The composition of the Panel will be determined by the Preparatory Commission and revised as required. The Training Panel shall meet during meetings of the Preparatory Commission, unless the Commission decides otherwise.

3.1.3 The Training Panel shall:

(a) Establish a training schedule based on information furnished by the registered pioneer investors in accordance with the policy set forth in paragraph 2.6, bearing in mind particularly the initial manpower requirements of the Enterprise;

(b) Formulate the individual traineeships to be offered, including their objectives, description of the training, eligibility requirements and their duration and location, as well as other requirements that may be attached to a particular traineeship;

(c) Open a Register incorporating all the necessary information on the traineeships being offered under the current schedule;

(d) Make a selection from the nominees entered in the Register and recommend their designation to the Preparatory Commission in respect of the available traineeships;

(e) Establish a standard format for the preparation of performance reports to be prepared pursuant to the policy set forth in paragraph 2.10;

/...

(f) Evaluate performance reports in the event that designated persons are selected for further training;

(g) Prepare for the Preparatory Commission training certificates attesting to the completion of a traineeship and to the nature of the training given;

(h) Keep the Programme under review particularly with respect to established priorities, scheduling and financial implications, taking account also of the experience gained by both registered pioneer investors and trainees;

(i) Submit an annual progress report to the Preparatory Commission on the training provided, including information on all expenditures made under the Programme;

(j) Establish procedures as may be required for the administration of the Programme; and

(k) Receive information and advice from Governments or institutions on relevant training provided by means of seminars and other forms of group training and inform the Preparatory Commission thereof.

3.1.4 Administrative and support services will be provided to the Training Panel by the United Nations Office for Ocean Affairs and the Law of the Sea. These services will include the processing of candidatures and, on behalf of the Preparatory Commission and the future Enterprise, the maintenance of personnel records on trainees.

3.2 Nomination and selection of candidates

3.2.1 Upon the establishment of the Register by the Training Panel, the United Nations Office for Ocean Affairs and the Law of the Sea will circulate notices to Governments, signatories to the Convention, inviting nominations against the traineeships set forth in the Register.

3.2.2 Selection will be done according to the policy set forth in paragraph 2.8, and shall take account of such factors as age and the language skills desired for a particular traineeship.

3.2.3 Persons selected from the Register by the Training Panel will be recommended for designation by the Preparatory Commission under paragraph 12 of resolution II.

3.2.4 Nominating Governments will co-operate in facilitating the availability of the designated person at the time and for the period established in the traineeship. In accordance with the policy set forth in paragraph 2.11, these Governments will also co-operate with the future Enterprise in making available the services of their nationals trained under the Programme.

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3.3 Conditions and requirements of traineeships

3.3.1 The registered pioneer investors are responsible for the direct supervision of the training they provide.

3.3.2 Appropriate arrangements will be made for insurance to cover liability to third parties for damage to persons or property caused by trainees, as well as to cover sickness, accident, disability or death of a trainee, during the course of the training.

3.3.3 The trainees must:

(a) Carry out their training in the manner and within the period prescribed by the Preparatory Commission;

(b) Conduct themselves at all times in a manner compatible with their status as holders of Preparatory Commission traineeships. In the event of failure to do so, the host Government may ask the Preparatory Commission to terminate the traineeship;

(c) Undertake, if so required by the registered pioneer investor concerned, to sign a confidentiality agreement and/or a non-competition agreement covering a reasonable period extending beyond the completion of the traineeship; 1/ and

(d) Obtain the written permission of the registered pioneer investor concerned, to publish, during the course of a traineeship, articles relating to his or her training.

These conditions and requirements shall be specified by the Preparatory Commission when granting traineeships.

3.4 Administrative arrangements

3.4.1 Trainees are required to undergo a thorough medical examination upon notice of their designation and, if more than four months have elapsed prior to the commencement of the training, to undergo a further examination.

3.4.2 Appropriate arrangements will be made with respect to:

(a) The travel of the trainees;

(b) The living expenses of the trainees and any other incidental costs associated with the traineeship;

(c) Medical insurance coverage.

3.4.3 The Government of the trainee is responsible for assistance in securing the necessary passports and visas and the receiving Government will also co-operate to this end.

Notes

1/ The duration of each agreement will be determined following consultations between the Preparatory Commission and the registered pioneer investor concerned.

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PREPARATORY COMMISSION FOR THE
INTERNATIONAL SEA-BED AUTHORITY AND
FOR THE INTERNATIONAL TRIBUNAL FOR
THE LAW OF THE SEA
Special Commission 2
New York, 14 August-1 September 1989

DRAFT PRINCIPLES, POLICIES, GUIDELINES AND PROCEDURES FOR A PREPARATORY COMMISSION TRAINING PROGRAMME

Pursuant to resolution II, paragraph 12 (a) (ii), the Preparatory Commission hereby establishes a Training Programme for the interim period which will be carried out in the context of pioneer activities, as defined in resolution II, paragraph 1 (b).

The principles, policies, guidelines and procedures governing the Programme will be as follows.

1. Principles

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1.2 Training must ensure the ability of the Enterprise not only to carry out activities in a timely manner but also to keep pace with States and other entities operating in the Area.

1.3 Training must cover all levels and aspects of sea-bed mining activities.

1.4 Training must aim at helping the Enterprise to recruit a sufficient number of personnel of high qualifications and technical competence.

2. Policies

2.1 In furtherance of the principle set forth in paragraph 1.1, the Preparatory Commission will establish a Training Panel to plan and carry out the Programme.

/...

2.2 The Programme will provide training in all the different disciplines and skills required by the future Enterprise, to the same extent and level that these disciplines and skills are practised by the registered pioneer investors.

2.3 The Programme will incorporate, as and when appropriate, both general and specialized training, and both theoretical and practical training. The training methods and facilities used by each registered pioneer investor, including those with a technological component, should be the best available to it. Where training or a component of the training provided is to be undertaken in universities or research institutions, these must be widely recognized in the country concerned.

2.4 The Programme will give initial priority to training in surveying and exploration, and assessment of the results thereof.

2.5 The Programme will aim at maximum cost-effectiveness and the achievement of an appropriate balance between its qualitative and quantitative requirements.

2.6 Implementation of the Programme will be scheduled in such a way as to maximize the value and timeliness of the knowledge and experience gained by trainees relative to the date of establishment of the Enterprise. Pioneer investors will, after their registration and at set intervals thereafter, advise the Preparatory Commission of the training opportunities arising out of their pioneer activities. They will also advise the Preparatory Commission of the financial implications of their proposed training schedules.

2.7 All signatories to the Convention will be entitled to nominate candidates for training.

2.8 Selection of candidates by the Training Panel and their subsequent designation by the Preparatory Commission will be done in accordance with resolution II, paragraph 12 (a) (ii), bearing in mind the need to ensure both the highest possible standards and equitable geographical distribution. As appropriate, designated trainees may undergo more than one period of training and may also receive training from more than one registered pioneer investor.

2.9 Traineeships will not, in principle, be awarded for the pursuit of academic studies leading to degrees or diplomas. Rather, they are intended to give persons the opportunity to extend their professional or technical knowledge and experience to areas applicable to future sea-bed mining and to acquaint them with advanced methods and techniques currently used by registered pioneer investors.

2.10 Registered pioneer investors will submit to the Preparatory Commission reports on each person trained, including a full description of the training provided and the context in which it was carried out.

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2.11 The Programme will require that Governments of trainees give assurances to the Preparatory Commission that the persons concerned will be appropriately reabsorbed in their professions or employed in related fields. These Governments will also be required to co-operate in making trained persons available to the Enterprise at its request and, in the interim period, to the Preparatory Commission should it require the services of these experts.

2.12 The Programme will require that the Preparatory Commission, the trainees selected and their Governments co-operate in observing the procedures and formalities required by the States receiving the trainees.

3. Guidelines and procedures

3.1 The Training Panel

3.1.1 The Training Panel will recommend to the Preparatory Commission the measures to be taken pursuant to the principles and policies established for the implementation of paragraph 12 (a) (ii) of resolution II.

3.1.2 The Panel will consist of 15 members who are experts in appropriate fields. The composition of the Panel will be determined by the Preparatory Commission and revised as required. The Training Panel will meet during meetings of the Preparatory Commission, unless the Commission decides otherwise.

3.1.3 The Training Panel will:

(a) Establish a training schedule based on information furnished by the registered pioneer investors in accordance with the policy set forth in paragraph 2.6, bearing in mind particularly the initial manpower requirements of the Enterprise;

(b) Formulate the individual traineeships to be offered, including their objectives, a description of the training, eligibility requirements and their duration and location, as well as other requirements that may be attached to a particular traineeship;

(c) Open a register incorporating all the necessary information on the traineeships being offered under the current schedule;

(d) Make a selection from the nominees entered in the Register and recommend them to the Preparatory Commission for designation in respect of the available traineeships;

(e) Establish a standard format for the preparation of performance reports to be prepared pursuant to the policy set forth in paragraph 2.10;

(f) Evaluate performance reports in the event that designated persons are selected for further training;

(g) Prepare for the Preparatory Commission training certificates attesting to the completion of a traineeship and to the nature of the training given;

(h) Keep the Programme under review particularly with respect to established priorities, scheduling and financial implications, taking account also of the experience gained by both registered pioneer investors and trainees;

(i) Submit an annual progress report to the Preparatory Commission on the training provided, including information on all expenditures made under the Programme;

(j) Establish procedures as may be required for the administration of the Programme;

(k) Receive information and advice from Governments or institutions on relevant training provided by means of seminars and other forms of group training and inform the Preparatory Commission thereof.

3.1.4 Administrative and support services will be provided to the Training Panel by the United Nations Office for Ocean Affairs and the Law of the Sea. These services will include the processing of candidatures and, on behalf of the Preparatory Commission and the future Enterprise, the maintenance of personnel records on trainees.

3.2 Nomination and selection of candidates

3.2.1 Upon the establishment of the Register by the Training Panel, the United Nations Office for Ocean Affairs and the Law of the Sea will circulate notices to Governments, signatories to the Convention, inviting nominations against the traineeships set forth in the Register.

3.2.2 Selection will be done according to the policy set forth in paragraph 2.8, and shall take account of such factors as age and the language skills desired for a particular traineeship.

3.2.3 Persons selected from the Register by the Training Panel will be recommended for designation by the Preparatory Commission under paragraph 12 of resolution II.

3.2.4 Nominating Governments will co-operate in facilitating the availability of the designated person at the time and for the period established in the traineeship. In accordance with the policy set forth in paragraph 2.11, these Governments will also co-operate with the future Enterprise in making available the services of their nationals trained under the Programme.

3.3 Conditions and requirements of traineeships

3.3.1 The registered pioneer investors will be responsible for the direct supervision of the training they provide.

3.3.2 Appropriate arrangements will be made for insurance to cover liability to third parties for damage to persons or property caused by trainees, as well as to cover sickness, accident, disability or death of a trainee during the course of the training.

3.3.3 The trainees must:

(a) Carry out their training in the manner and within the period prescribed by the Preparatory Commission;

(b) Conduct themselves at all times in a manner compatible with their status as holders of Preparatory Commission traineeships. In the event of failure to do so, the host Government may ask the Preparatory Commission to terminate the traineeship;

(c) Undertake, if so required by the registered pioneer investor concerned, to sign a confidentiality agreement and/or a non-competition agreement covering a reasonable period extending beyond the completion of the traineeship; 1/

(d) Obtain the written permission of the registered pioneer investor concerned to publish, during the course of a traineeship, articles relating to his or her training.

These conditions and requirements will be specified by the Preparatory Commission when granting traineeships.

3.4 Administrative arrangements

3.4.1 Trainees will be required to undergo a thorough medical examination upon notice of their designation and, if more than four months have elapsed prior to the commencement of the training, to undergo a further examination.

3.4.2 Appropriate arrangements will be made with respect to:

(a) The travel of the trainees;

(b) The living expenses of the trainees and any other incidental costs associated with the traineeship;

(c) Medical insurance coverage.

/...

3.4.3 The Government of the trainee will be responsible for assistance in securing the necessary passports and visas and the receiving Government will also co-operate to this end.

Notes

1/ The duration of each agreement will be determined following consultations between the Preparatory Commission and the registered pioneer investor concerned.

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Eighth session
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IMPLEMENTATION OF THE PREPARATORY COMMISSION TRAINING PROGRAMME

RECOMMENDATIONS OF SPECIAL COMMISSION 2

Training is the most important step in providing manpower resources for the Enterprise when it comes into operation. Training is to be seen as a continuous process, and the measures taken during the interim period in accordance with resolution II are a first step in a process to be continued by the Authority and the Enterprise, after entry into force of the Convention.

The Preparatory Commission has adopted the Principles, Policies, Guidelines and Procedures for the Training Programme (as contained in LOS/PCN/SCN.2/L.6/Rev.1) and since the Commission hopes to complete its work by the summer of 1991, the Programme must be under way by that time. The Training Programme shall start as soon as possible after the Preparatory Commission reaches an understanding on the manner in which the Registered Pioneer Investors will fulfil their obligations. In view of the relatively short period of time remaining, the Special Commission recommends the following arrangement.

STEP 1: ESTABLISH THE PANEL AND INSTRUCT THE SECRETARIAT TO COLLECT AND COLLATE THE INFORMATION NEEDED ON POTENTIAL CANDIDATES AND AVAILABLE TRAINEESHIPS

(a) The Panel should be established, if possible, this year. To do this will require a decision, with reference to paragraph 3.1.2. of L.6/Rev.1, on the nature of the expertise required on the Panel and on the composition of the 15 members. It may be advisable, under this initial arrangement, also to clearly specify that meetings of the Panel will take place during a Preparatory Commission session and that there will be no extra cost involved since Panel members will be attached to the delegations involved.

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* Reissued for technical reasons.

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(b) Upon the request of the Panel, the United Nations Office for Ocean Affairs and the Law of the Sea should carry out the necessary initial functions, as outlined in paragraph 3.1.3, subparagraphs (a), (b) and (c) of L.6/Rev.1. To do this, it will be necessary for the Preparatory Commission to approve the contents of a draft note verbale, to be circulated by the Secretary-General to Member and Observer Governments of the Preparatory Commission. It should call attention to the requirements set forth in L.6/Rev.1 and give additional guidance to Governments to facilitate their selection of nominees. The following elements of the draft note verbale are proposed hereunder:

(i) Governments should be asked to propose one nominee and one alternate, with reference to the particular disciplines described in the Note. It would therefore be necessary to agree on the total list of disciplines involved together with the level of education and experience required and the preferred ages. The disciplines will be those involved in "surveying and exploration, and assessment of the results thereof" in accordance with paragraph 2.4 of L.6/Rev.1, e.g. marine geology, marine geophysics, marine ecology, marine mining engineering, physical oceanography, including sedimentology, and marine dredging. As to qualifications, the Note should ask for a post-graduate degree in science from a University or a graduate degree in engineering; as to experience, at least 2 years of actual work in the relevant field; and as to age, the nominees should be between 25 and 35 years of age, in exceptional cases no older than 40.

(ii) In order that Governments may appreciate the initial scope of the Programme, the Note should specify the number to be accepted in the first group of trainees.

(iii) The Note should call for assurances from the nominating Governments that persons selected, and who are currently employed, are put on leave of absence with pay during the period of their training.

(iv) Other recommended elements of the Note include: advice that a selected person would be required to sign a contract obligating him to serve the Enterprise if called upon, or to serve his or her country for at least 3 years after training; reference to the requirement for a rigorous medical and psychological examination as well as for a subsequent aptitude test, following selection, in order to ensure that the trainee is able to work in a hostile marine environment. (This may include actual sea-going tests).

(c) During the same period in which nominations are being taken, the Secretariat will request Registered Pioneer Investors to indicate what traineeships are presently available or can be made available. It should also be asked to make inquiries with other technologically advanced States about educational and training facilities in areas relevant to sea-bed or ocean exploration, including those relating to the monitoring of deep sea-bed environments, so that further use can be made of the information on eligible persons submitted by nominating Governments.

(d) Following upon the Secretariat's receipt of nominations from Governments and receipt of information on traineeships from the Registered Pioneer Investors, it would facilitate the work of the Panel if the Secretariat were to prepare a collation or summary of the nominations in relation to the information on traineeships received. It may be necessary also for the Secretariat to clarify with nominating Governments that nominees are indeed available for the particular traineeships offered and to ascertain any additional information as to language skills, etc. It would also be useful for the Secretariat to compile a list, for reference purposes, of the educational and training facilities identified by technologically advanced States.

STEP 2: CONVENE THE FIRST MEETING OF THE PANEL TO SELECT CANDIDATES FOR DESIGNATION BY THE PREPARATORY COMMISSION

The Training Panel would meet during a session of the Preparatory Commission to select candidates against the available traineeships. At that point, it would be necessary to deal with certain additional matters, such as the insurance arrangement under each traineeship, and the preparation of a standardized agreement on confidentiality/non-competition.

Given the several, necessarily sequential steps involved in the administration of the Programme, it is all the more important that the process is initiated this year.

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Special Commission 2
New York, 12-30 August 1991

RECOMMENDED ANNOTATIONS BY SPECIAL COMMISSION 2 ON THE PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE

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INTRODUCTION

1. The present paper contains the recommendations of Special Commission 2 to the plenary of the Preparatory Commission on the structure and organization of the Enterprise. It incorporates the annotations which were made to working paper 16 (LOS/PCN/SCN.2/WP.16), entitled "Provisions of the Convention relating to the structure and organization of the Enterprise", and recommends supplementary draft provisions to that working paper.

2. Working paper 16 proved to be useful because it is a compendium of all the relevant provisions of the Convention relating to the Enterprise, which are dispersed throughout Part XI and its annexes. It served to identify those provisions of the Convention to which annotations were required to assist the Authority, and subsequently the Enterprise, in making their initial decisions. The working paper also served to identify those elements that would form the substance of recommendations to the Authority on transitional arrangements during the pre-operational stage of the Enterprise. The suggestions of the Chairman to facilitate discussions on transitional arrangements for the Enterprise are contained in documents LOS/PCN/SCN.2/1990/CRP.5 and Addenda 1 and 2.

3. The Special Commission in its meetings on the question of annotations agreed that, while it could not amend the Convention, it could furnish liberal interpretations of its provisions by way of annotations as long as their basic purpose and intent were not disturbed. It was understood that these annotations would serve several purposes: (1) to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretations; (2) to suggest supplementary draft provisions, if necessary, to facilitate its effective application; and (3) to suggest additional draft rules on matters such as confidentiality, on which the Convention has no rule specific to the Enterprise.

4. In general, the Special Commission addressed the need to preserve maximum autonomy for the fully fledged Enterprise and flexibility in its operations, in keeping with its basic commercial character and the need to ensure efficient management and a streamlined structure.

5. There was general agreement that in the relationship between the Governing Board and the Council/Assembly, it would be important to avoid placing unnecessary constraints on the Enterprise. Here, it was also emphasized that the directives given to the Enterprise should be limited to those of a political character, while commercial considerations would be the exclusive concern of the Governing Board of the Enterprise. The Enterprise, it was stressed, would need to be businesslike in its dealings and be protected against pressures from the Authority. In order to avoid interference in the day-to-day operations of the Enterprise by the Governing Board, it was pointed out that the Director-General required independence. It was also noted that it would be important for the mining code to avoid introducing constraints on the Enterprise, e.g., with respect to its procedures for the acquisition of technology.

6. On the basis of the discussions on the various articles in working paper 16, the Special Commission found that annotations were called for with respect to a number of articles. Changes which were made to the articles themselves are underscored in the text that follows.

PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE AND RECOMMENDED ANNOTATIONS THEREON

Article 1

Use of terms

For the purposes of these articles:

(1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;

(2) "Authority" means the International Seabed Authority;

(3) "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area;

(4) "Convention" means the United Nations Convention on the Law of the Sea;

(5) "Secretary-General" means the Secretary-General of the Authority;

(6) "debt guarantee" means a promise of a State Party to creditors of the Enterprise to pay, *pro rata* in accordance with the appropriate scale, the financial obligations of the Enterprise covered by the guarantee following notice by the creditors to the State Party of a default by the Enterprise. Procedures for the payment of those obligations shall be in conformity with the rules, regulations and procedures of the Authority; 1/

(7) "States Parties" has the same meaning as in article 1, paragraph 2, of the Convention;

(8) "Director-General" means the Director-General of the Enterprise.

(9) "Governing Board" means the Governing Board of the Enterprise.

1/ Annex IV, article 11 (3) (h).

Annotation

(1) The Special Commission agreed that the definition of "Governing Board" should be included in the article. Working paper 16 was thus amended to include a new subparagraph 9. The Special Commission decided not to include a definition of the term "nucleus Enterprise", since the definition and functions of the nucleus Enterprise are contained in documents LOS/PCN/SCN.2/1990/CRP.5 and Add.1.

(2) In subparagraph 6 the more general question of how the Enterprise is to be financed was raised in the event that the major contributors (based on the United Nations scale of assessments) do not join. It was noted that the following questions would need to be addressed: whether payment by a State Party of the debt would be treated as a loan to the Enterprise, and if so, whether it was an interest-bearing loan or not; and whether a debt was convertible or not.

Section 1. ESTABLISHMENT OF THE ENTERPRISE

Article 2

Establishment

There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1, of the Convention. 2/

Section 2. PURPOSES OF THE ENTERPRISE

Article 3

Purposes of the Enterprise

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2 (a), of the Convention, as well as the transporting, processing and marketing of minerals recovered from the Area. 3/

2/ Article 158 (2).

3/ Article 170 (1).

2. In carrying out its purposes and its functions, the Enterprise shall not interfere in the political affairs of any State Party, nor shall it be influenced in its decisions by the political character of the State Party concerned. 4/

3. Only commercial considerations shall be relevant to its decisions, and these considerations shall be weighed impartially in order to carry out the purposes specified in Annex IV, article 1, of the Convention. 5/

Annotation

(1) This article was described as one which lent itself to flexible interpretation. It was pointed out that paragraph 1 required modification in order to make it more reasonable in the face of current realities and to ensure compatibility with paragraph 3. It was suggested that the Enterprise would initially do less than what had been laid down in the Convention, possibly only monitoring, training, pre-feasibility studies, including studies of operational options. Functions could be assigned to the nucleus Enterprise to be carried out in various stages. It was decided that those questions were best dealt with under a transitional arrangement.

(2) Discussions on paragraph 3 centred on whether the Enterprise should take its decisions only on the basis of "commercial considerations". While some agreed with this, others suggested that profit earning should not be its sole motive, because the Enterprise was there for the common good and it should be a leader in deep seabed mining. It was further suggested that, as a result of the need to preserve the marine environment, the Enterprise should in its decisions take into account any relevant regulatory requirements. While the need to protect and preserve the marine environment enjoyed the full support of the Special Commission, it was pointed out that paragraph 3 was not the place in which to reflect this concern since that paragraph contained the principle on the basis of which the Enterprise was to operate. The need to protect and preserve the marine environment, it was therefore suggested, should be reflected in the provisions regarding the implementation of the functions of the Enterprise.

(3) Some questioned the subdivision of paragraphs 2 and 3 since care had been taken at the time of the Conference not to do so, while others considered it to be a good idea to separate the commercial aspects from the political ones. There was general agreement that decisions relating to political matters should only be made by the Council or the Assembly.

4/ Annex IV, article 12 (7).

5/ Annex IV, article 12 (7).

/...

(4) It was thought that the area of commercial considerations should be left broad. It would be unrealistic to expect the Enterprise to operate only on sound commercial principles in its initial stage, when it would be more concerned with monitoring and research operations. In this connection, it was observed that the meaning of sound commercial principles today included pre-operational work on research and development. This observation was followed by a general discussion on whether the Enterprise should in its initial phase engage in research and development of technology, or whether it should acquire it through transfer of technology. Questions of costs were raised if the Enterprise were to set up its own research and development unit. Some suggested that the Enterprise should concentrate its initial efforts on monitoring the activities of the registered pioneer investors and others engaged in seabed mining. It was recognized that initially the Enterprise would need only a small research and development unit, maybe one or two professional staff, leaving room for expansion later.

(5) It was agreed that the reference in paragraph 3 should not be to paragraph 1 but to Annex IV, article 1, of the Convention because it would otherwise result in an inconsistency with the Convention's direction on the matter.

Section 3. LEGAL PERSONALITY

Article 4

Legal personality

1. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is necessary for the exercise of its functions and the fulfilment of its purposes as is provided for in the Statute set forth in Annex IV and, in particular, the capacity: 6/

(a) to enter into contracts, joint arrangements or other arrangements, including agreements with States and international organizations;

(b) to acquire, lease, hold and dispose of immovable and movable property;

(c) to be a party to legal proceedings; 7/

(d) to loan money, issue guarantees and use its credit;

6/ Article 170 (2); Annex IV, article 13 (2).

7/ Annex IV, article 13.

/...

(e) to acquire, hold, use and dispose of shares or other interests in, or obligations of, corporations, associations, partnerships, trusts or other enterprises, or any obligations of a Government;

(f) to pay pension and establish pension plans, profit sharing and other incentive plans for its staff;

(g) to indemnify the members of the Governing Board, the Director-General, officials and staff; and

(h) to exercise such powers incidental to its business as shall be necessary. 8/

2. The Enterprise shall act in accordance with the Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. 9/

3. Subject to paragraph 2, the Enterprise shall enjoy autonomy in the conduct of its operations. 10/

Annotation

(1) The opinion was expressed that the functions outlined in paragraph 1 (d) and (e) should not be under the purview of the Enterprise, but should be left to the Council or Assembly. Given current realities, it was pointed out that there was no reason for the Enterprise to undertake these functions since they would not be required in the foreseeable future at any rate. It was proposed that the Enterprise should give the proceeds from its operations to those that needed it and not reinvest it; reinvestments, it was suggested, might result in benefits being denied to a larger community. On the other hand, it was stated that most businesses needed the freedom to carry out the functions contained in paragraph 1 (d) and (e) and that they constituted general practice. It was pointed out that the Enterprise should not be strait-jacketed by provisions which prevented it from playing the market and maximizing its profits. Functions like these would also ensure the Enterprise's autonomy.

8/ Annex IV, article 12 (6).

9/ Article 170 (2).

10/ Annex IV, article 2 (2).

(2) Clarification was sought as to what is meant by "or any obligations of a Government" in paragraph 1 (e). It was noted that the guiding part of subparagraph (e) was its first line, i.e., "to acquire, hold, use and dispose of shares or other interests in," the implication being that the Enterprise can also deal with Governments. In that connection it was noted that this should not be a function of the Governing Board. The suggestion was made that a term other than "obligations" might be more suitable.

Section 4. PLACE OF BUSINESS

Article 5

Place of business

1. The Enterprise shall have its principal office at the seat of the Authority. 11/

2. The Governing Board may establish in the territory of any State Party with the consent of that State Party other offices and facilities as it deems necessary for the exercise of the functions of the Enterprise. 12/

Section 5. STRUCTURE OF THE ENTERPRISE

Article 6

Structure

The Enterprise shall have a Governing Board, a Director-General and the staff necessary for the exercise of its functions. 13/

Annotation

Attention was given to the relationship between the Director-General and his staff, with emphasis on the need for the Director-General to have full control over day-to-day operations. It was agreed that the power to appoint and dismiss staff must be at his discretion.

11/ Annex IV, article 8.

12/ Annex IV, article 8.

13/ Annex IV, article 4.

Section 6. THE GOVERNING BOARD

Article 7

Convening of first meeting

The first meeting of the Governing Board shall be convened by the Secretary-General within [...] following the date on which the Convention enters into force.

Article 8

Frequency of meetings

The Governing Board shall meet as often as the business of the Enterprise may require. 14/

Article 9

Place of meeting

The Governing Board shall normally function at the principal office of the Enterprise. 15/

Article 10

Membership

1. The Governing Board shall be composed of 15 members elected in accordance with article 24, subparagraph (b). 16/

2. Members of the Board shall act in their personal capacity. In the performance of their duties they shall not seek or receive instructions from any Government or from any other source. 17/

14/ Annex IV, article 5 (6).

15/ Annex IV, article 5 (6).

16/ Annex IV, article 5 (1).

17/ Annex IV, article 5 (4).

Annotation

It was pointed out that a time-frame would need to be set for the first election of the members of the Governing Board. In this connection, it was noted that it would be up to the Authority to decide when that election should take place.

Article 11

Equitable geographical distribution and the representation of special interests

In the election of members of the Governing Board, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. 18/

Annotation

Some favoured the deletion of the reference to "special interests" in the article while reserving their position on the question of the representation of land-locked and geographically disadvantaged States. It was noted that while the Secretariat had made a reasonable analogy to the election of other bodies of the Authority, namely the Commissions, the reference to "special interests" should, none the less, be deleted in the absence of a direct guideline in the Convention. It was also noted that there was no definition of "special interests" in the Convention and that article 5 (1) of Annex IV only referred to the principle of equitable geographical distribution. Furthermore, it was argued that since the members of the Governing Board should act in their personal capacity there was no need for the criteria of special interests. It was therefore proposed that the reference in footnote 18 be changed to article 5 (1) of Annex IV instead of article 163 (4). Others opposed the deletion of the reference to "special interests" and a consequent change in footnote 18. Another member considered it important to retain the reference in view of the position of land-locked and geographically disadvantaged States.

Article 12

Nominations

In submitting nominations of candidates for election to the Governing Board, members of the Authority shall bear in mind the need to nominate candidates of the highest standard of competence, with qualifications in

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18/ Based upon article 163 (4).

relevant fields, so as to ensure the viability and success of the Enterprise. 19/

Annotation

It was pointed out that the reference to "relevant fields" would require elaboration. In this connection it was observed that candidates should have technical and relevant practical experience. It was suggested that this should be made explicit in the article. It was noted that guidance as to some of the types of expertise required might be inferred from the table in document LOS/PCN/BUR/R.6, i.e., the report of the Group of Technical Experts to the General Committee, in which are outlined the priority disciplines which training should address. It was emphasized that a combination of expertise should be represented on the Governing Board, for example, financial accounting and administrative and project management.

Article 13

Term of office

1. Members of the Governing Board shall be elected for four years and may be re-elected; and due regard shall be paid to the principle of rotation of membership. 20/

2. Members of the Board shall continue in office until their successors are elected. 21/

3. If the office of a member of the Board becomes vacant, the Assembly shall, in accordance with article 24, subparagraph (b), elect a new member for the remainder of his predecessor's term. 22/

Annotation

(1) With respect to paragraph 1, it was proposed that, a method should be found to rotate the membership of the Governing Board in such a way as to ensure continuity.

19/ Annex IV, article 5 (1).

20/ Annex IV, article 5 (2).

21/ Annex IV, article 5 (3).

22/ Annex IV, article 5 (3).

/...

(2) Following the discussions on articles 16, 17 and 18, and specifically the need to deal with the problem of repeated absenteeism without good reason, it was suggested that an annotation could be made under paragraph 3 to the effect that a member who was absent without good cause for three, four or five statutory meetings of the Board would be disqualified.

Article 14

Remuneration

Each member of the Governing Board shall receive remuneration to be paid out of the funds of the Enterprise. The amount of remuneration shall be fixed by the Assembly, upon the recommendation of the Council. 23/

Article 15

Powers and functions of the Governing Board

1. The Governing Board shall direct the operations of the Enterprise. Subject to the Convention, the Board shall exercise the powers necessary to fulfil the purposes of the Enterprise, including powers: 24/

(a) to elect a Chairman from among its members;

(b) to adopt its rules of procedure;

(c) to draw up and submit formal written plans of work to the Council in accordance with article 153, paragraph 3, and article 162, paragraph 2 (j), of the Convention;

(d) to develop plans of work and programmes for carrying out the activities specified in article 170 of the Convention;

(e) to prepare and submit to the Council applications for production authorizations in accordance with article 151, paragraphs 2 to 7, of the Convention;

(f) to authorize negotiations concerning the acquisition of technology, including those provided for in Annex III, article 5, paragraph 3 (a), (c) and (d), of the Convention, and to approve the results of those negotiations;

23/ Annex IV, article 5 (5).

24/ Annex IV, article 6.

/...

(g) to establish terms and conditions, and to authorize negotiations, concerning joint ventures and other forms of joint arrangements referred to in Annex III, articles 9 and 11, of the Convention, and to approve the results of such negotiations;

(h) to recommend to the Assembly what portion of the net income of the Enterprise should be retained as its reserves in accordance with article 160, paragraph 2 (f), and Annex IV, article 10, of the Convention;

(i) to approve the annual budget of the Enterprise;

(j) to authorize the procurement of goods and services in accordance with Annex IV, article 12, paragraph 3, of the Convention;

(k) to submit an annual report to the Council in accordance with Annex IV, article 9, of the Convention;

(l) to submit to the Council for the approval of the Assembly draft rules in respect of the organization, management, appointment and dismissal of the staff of the Enterprise and to adopt regulations to give effect to such rules;

(m) to borrow funds and to furnish such collateral or other security as it may determine in accordance with Annex IV, article 11, paragraph 2, of the Convention;

(n) to enter into any legal proceedings, agreements and transactions and to take any other actions in accordance with Annex IV, article 13, of the Convention;

(o) to delegate, subject to the approval of the Council, any non-discretionary powers to the Director-General and to its committees;

(p) to nominate the Director-General for recommendation by the Council and election by the Assembly; 25/

(q) to recommend to the Council the ceiling on the Enterprise's borrowings; 26/

25/ Annex IV, article 7 (1).

26/ Annex IV, article 11 (2) (a).

/...

(r) to prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention; 27/

(s) to prepare a funding schedule for the repayment of the interest-free loans to the Enterprise from States Parties to be adopted by the Assembly on the recommendation of the Council. 28/

2. In addition, the Governing Board shall:

(a) establish procurement rules, regulations and procedures in accordance with article 43; 29/

(b) establish reporting requirements and procedures pursuant to Annex IV, article 9, of the Convention;

(c) set out procedures for funding pursuant to Annex IV, article 11, of the Convention;

(d) provide procedures for the approval of the annual budget pursuant to article 15, paragraph 1 (i);

(e) establish accounting and internal audit procedures.

Annotation

(1) The general question was raised as to whether there was any point in electing the Governing Board upon the establishment of the Enterprise if the current economic conditions persisted, since it would end up being a burden on the budget of the Authority. The opinion was expressed that it was necessary to elect a Governing Board upon the establishment of the Enterprise, in order for it to determine policy decisions which the Enterprise would implement, but that the frequency of the Board's meetings in the initial stages could be significantly reduced.

(2) It was noted that article 15, listing 20 functions of the Governing Board, was difficult to relate to the need for flexible management and a dynamic Director-General.

27/ Annex IV, article 11 (3) (d) (ii).

28/ Annex IV, article 11 (3) (f).

29/ Annex IV, article 12 (3).

/...

(3) With respect to paragraph 1 (b), the question was raised as to whether it was up to Special Commission 2 to prepare rules of procedure for the Governing Board. It was pointed out that the Board has been given the authority to determine its own rules of procedure and that Special Commission 2 was not to make binding rules for the Board but only recommendations in its annotations. It was suggested that the Governing Board should include in its rules of procedure some rules regarding the length of the term of office of the Chairman, the question of the rotation of the Chairman and the members of the Governing Board as well as the question of equitable geographical distribution on the Board.

(4) Following the discussions on articles 16, 17 and 18, it was suggested that the Governing Board should in its rules of procedure take into account the possibility of consultations on non-substantive matters being undertaken by the Chairman and some of the members of the Board outside the framework of a meeting of the Board. This procedure would, for example, apply to budgetary matters which did not involve any additional expenses. The Chairman could communicate with the members by mail and obtain their views on such matters.

(5) Since the Convention was silent on the subject of vice-chairmen, it was also pointed out that it was usual practice to provide for one or two vice-chairmen in the event that the Chairman was unable to attend meetings of the Board.

(6) There was extensive discussion on paragraph 2 (e) and the question of whether the Governing Board should establish its own internal audit and accounting procedures or whether this should be left to the Authority. While it was considered necessary to allow the Board the freedom to decide on the internal audit procedures which should be followed since the internal audit was essentially there for the benefit of the Director-General - it is his internal check system or early watchdog unit - no agreement could be reached on the question of whether the Governing Board should establish its own accounting procedures.

(7) While it was agreed that it was the Council which would draw up accounting rules, it was pointed out that there was no provision in the Convention which specifically authorized the Council to establish accounting procedures. The view was expressed that approval should be given by the Council for the Governing Board to establish accounting procedures for the Enterprise and that this should be listed as a function of the Council under article 25. Since the Enterprise would also be engaged in commercial operations, it was suggested that its accounting rules and procedures should closely follow those developed for contractors. It was pointed out that the decision on accounting procedures for the Enterprise should await the results of the ongoing discussions on the subject in relation to the contractor in Special Commission 3, since at its conclusion a set of accounting rules and procedures were to be appended to the contract. It was further noted that if Special Commission 3 accepted the accounting principles and procedures contained in document LOS/PCN/SCN.3/WP.6/Add.7 they would be part of the

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generally recognized accounting principles in accordance with which the Enterprise was to establish its accounting procedures. Another view was that the Enterprise had the autonomy to establish its own accounting procedures without obtaining approval from the Council. Reference was also made to article 30 where provision was made for an annual audit by an independent auditor appointed by the Council. A proposal was made to subdivide subparagraph (e) into new subparagraphs (e) and (f) as follows:

> "(e) to establish accounting procedures in accordance with generally recognized accounting principles;
>
> "(f) to establish internal audit procedures."

(8) It was pointed out that most companies' accounting procedures were based on accounting principles in use and that the accounting procedures conformed to a general format. The phrase "in accordance with generally recognized accounting principles" is a standard phrase which applies to a large number of countries in the world and has a standing in the professional community of accountants.

Article 16

Quorum for meetings

Two thirds of the members of the Governing Board shall constitute a quorum. 30/

Article 17

Voting rights

Each member of the Governing Board shall have one vote. 31/

Article 18

Decision-making

1. All matters before the Governing Board shall be decided by a majority of its members. If a member has a conflict of interest on a matter before the Board he shall refrain from voting on that matter. 32/

30/ Annex IV, article 5 (7).

31/ Annex IV, article 5 (8).

32/ Annex IV, article 5 (8).

2. Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement.

3. [Deleted]

Annotation to articles 16, 17 and 18

(1) There was extensive discussion on the possibility of delaying decisions if only two thirds of the members of the Governing Board were able to attend a meeting of the Board and a decision had to be taken by a majority. Two suggestions were made to deal with the problem: first, that proxy voting should be permitted; and second, that the Governing Board could provide in its rules of procedure that where a decision had to be taken by a quorum the decision of a member who could not be present had to be confirmed by a postal ballot. It was observed that proxy voting was only possible if there was a quorum. In this connection it was pointed out that it was the responsibility of the Chairman to ensure that the members of the Board were able to attend a meeting. It was recognized that once a quorum was established and a decision needed to be taken by a majority, proxy voting should be permitted where it was not possible to get a majority. Advanced information on matters which would be discussed at the meeting would have to be sent to the members of the Governing Board so that the members voting by proxy would have all the necessary information. The Special Commission understood the term "majority" in paragraph 1 of article 18 to mean a majority of the members of the Governing Board.

(2) It was stressed that the problem of repeated absenteeism of members of the Governing Board, without good reason, would require some disciplinary measures. It was suggested that an annotation could be made to this effect under article 13 (3).

(3) With respect to the issue of conflict of interest in the second sentence of paragraph 1 of article 18, it was recognized that where a member had or acquired in the future an interest in the matter being voted on, a legal obligation to refrain from voting, rather than a provision which appealed to his morality, was called for. It was suggested that the Governing Board should in cases of doubt determine by a majority whether or not there was in fact a conflict of interest.

(4) It was observed that since paragraph 2 of article 18 did not derive from the Convention, the provision should be hortatory and not obligatory in respect of arriving at decisions on the basis of consensus or general agreement. It was decided to delete paragraph 3 which contained the definition of "consensus". The Special Commission agreed to reword paragraph 2 as follows: "Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement."

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Section 7. THE DIRECTOR-GENERAL AND THE STAFF OF THE ENTERPRISE

Article 19

The Director-General

1. The Director-General shall be elected in accordance with article 24, subparagraph (b).

2. The Director-General shall not be a member of the Governing Board.

3. The Director-General shall hold office for a fixed term, not exceeding five years, and may be re-elected for further terms. 33/

Article 20

Functions and duties of the Director-General

1. The Director-General shall act as the legal representative and chief executive of the Enterprise and shall be directly responsible to the Governing Board for the conduct of the operations of the Enterprise.

2. The Director-General shall be responsible for the organization, management, appointment and dismissal of the staff of the Enterprise in accordance with the rules and regulations referred to in article 15, paragraph 1 (1).

3. The Director-General shall participate, without the right to vote, in the meetings of the Governing Board and may participate, without the right to vote, in the meetings of the Assembly and the Council when these organs are dealing with matters concerning the Enterprise. 34/

Article 21

The staff of the Enterprise

1. The staff of the Enterprise shall be appointed by the Director-General. The terms and conditions on which they shall be appointed, remunerated and dismissed shall be in accordance with the rules and regulations referred to in article 15, paragraph 1 (1). 35/

33/ Annex IV, article 7 (1).

34/ Annex IV, article 7 (2).

35/ Based upon article 167 (3).

/...

2. The staff of the Enterprise shall consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Enterprise. [36]

3. The paramount consideration in the recruitment and employment of the staff and in the determination of their conditions of service shall be the necessity of securing the highest standards of efficiency and of technical competence. Subject to this consideration, due regard shall be paid to the importance of recruiting the staff on an equitable geographical basis. [37]

4. The responsibilities set forth in article 168, paragraph 2, of the Convention are equally applicable to the staff of the Enterprise. [38]

Article 22

International character of the Director-General and the staff

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any Government or from any other source external to the Enterprise. They shall refrain from any action which might reflect on their position as international officials of the Enterprise responsible only to the Enterprise. Each State Party undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities. [39]

Section 8. CONFIDENTIALITY

Article 23

Confidentiality

1. The members of the Governing Board and the Director-General and the staff of the Enterprise shall not disclose, even after the termination of their functions as such, any confidential information coming to their knowledge by reason of their duties on or in relation to the Enterprise.

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[36] Based upon article 167 (1).

[37] Annex IV, article 7 (3).

[38] Annex IV, article 7 (5).

[39] Annex IV, article 7 (4).

2. The duty of the members of the Governing Board and the Director-General and the staff of the Enterprise not to disclose confidential information constitutes both an obligation in respect of the individual's appointment or employment for the purposes of the Enterprise and a personal responsibility entailing financial liability. In addition to being liable to any financial or other sanction, any person who has disclosed confidential information in breach of his duty in that behalf shall cease to exercise any function in relation to the receipt or custody of confidential information and shall be disqualified from being re-elected or reappointed to exercise any such function. 40/

Annotation

(1) It was agreed that the rule suggested by the Secretariat (based on rule 16 in LOS/PCN/WP.24 of September 1984) would require redrafting and expansion and that it would also need to apply in the transitional period. It was thought that the drafting of a rule on confidentiality should not be left to the Enterprise as it might draft it to suit its own purposes.

(2) There was agreement that the rule should establish the basic principle, applicable to the Enterprise as a whole. It was suggested that this principle could incorporate the wording of article 168 (2) of the Convention. With respect to the mechanism for observance of this principle, it was pointed out that article 14 (3) of Annex III provided a juridical basis for confidentiality.

(3) It was proposed that provision should be made for the signing of a confidentiality clause or agreement at the time of employment. All that was needed was a signature which attested that a person had accepted the confidentiality clause and a provision providing for a penalty in case of breach. Whether there should be an oath or detailed staff rules would need to be worked out. It was pointed out that where there were no provisions for sanctions in municipal law, workers were often required to take an oath, e.g., under the Official Secrets Act.

(4) It was agreed that the obligation not to disclose confidential information should also cover the post-employment period. These sanctions should be different, of a financial or penal nature depending on the extent of the breach caused. However, it was agreed that a former employee should not be held liable in perpetuity.

40/ LOS/PCN/WP.24, rule 16.

(5) It was furthermore agreed that a differentiation should be made between management and staff. It was pointed out that it would be necessary to separate the responsibility of the management of the Governing Board from that of the Director-General. A uniform principle should, however, be applicable in both cases, but the terms might need to be different. It was proposed that a distinction should be made between staff with access to confidential information in the course of their normal duties and those without such access.

(6) It was proposed that in paragraph 1 the term "staff of the Enterprise" needed to be defined so as to make it clear that the provision applied to all staff, whether permanent, short-term, temporary staff or consultants. It was suggested that in the case of independent contractors an agreement could be drawn up with the Enterprise which would exempt the Enterprise from any liability for their acts.

(7) It was proposed that paragraph 2 should state that the Enterprise and its officers and staff were jointly and severally liable for any damages for breach of the obligations set forth in paragraph 1.

(8) It was pointed out that as the requirement of confidentiality was provided for in the Convention in the Authority itself, each of the executive bodies, i.e., the Council and Governing Board, had the responsibility not only to disclose confidential information but also to provide the mechanism to prevent this from happening.

(9) The question was raised as to which organ had the competence to establish financial liabilities and their extent. It was pointed out that the Director-General would be responsible for sanctions with respect to the staff. The Governing Board would be responsible for sanctions with respect to the Director-General and the Authority would be responsible with respect to the Governing Board. It was noted that it would be necessary to provide for a graduation of sanctions as breaches took place at different levels and might vary in magnitude.

(10) The question was raised as to the power of the Governing Board to impose sanctions for breach of confidentiality in relation to the post-employment period. It was pointed out that a former member could not be made a prisoner of his conscience and thus be stopped from earning a living. An analogy was drawn to the situation in municipal law where contracts in restraint of trade were intended to prevent the exploitation of trade secrets learned by the employee in the course of his employment.

(11) Several problems were highlighted in connection with the implementation of an enforcement mechanism, particularly if a breach occured after termination of employment, in which case national legislation would then be applicable. It was pointed out that some national systems had no sanctions and that there might be a problem in asking Governments to provide for such sanctions in their national laws. It was also pointed out that there might be a problem with implementing financial liability for breach of personal

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responsibility in case of bankruptcy. In this connection, it was suggested that the Enterprise could set up a fund akin to that which existed in national systems where insurance institutions provided coverage. While it was thought that there was no problem in setting up a fund for the staff, it was considered difficult to do the same for the members of the Governing Board as it would be hard to assess their collective and individual responsibility. It was pointed out that an insurance policy for staff would not be a real sanction and that it might be preferable to have a fidelity bond - financed through a deduction from the employees' salary - which would be forfeited once a staff member was found guilty of disclosing confidential information. Another option would be to dismiss the person concerned. It was thought that the Director-General, since he was in an intermediary position but in some respects also a civil servant, would in case of breach be directly responsible, by virtue of his function or title alone. It was considered that the rule with respect to the Director-General, as manager, should be as rigid as that for the staff.

(12) It was agreed that not only the violator but also the beneficiary of a violation should be punished through financial, penal or quasi-disciplinary administrative sanctions. If the recipient of the confidential information was a contractor or subcontractor, the party concerned could be disqualified. If he was an outsider or third company which had found out what the other competitors had bid in order to secure the award of a contract, then appropriate sanctions could be disqualification or blacklisting for the future. He would thus be debarred from conducting business with the Enterprise in the future.

Section 9. RELATIONSHIP OF THE ENTERPRISE TO THE ASSEMBLY AND TO THE COUNCIL OF THE AUTHORITY

Article 24

The Assembly

The Assembly shall:

(a) establish general policies for the Enterprise pursuant to article 170, paragraph 2, and Annex IV, article 2, paragraph 1, of the Convention;

(b) elect, upon the recommendation of the Council, the members of the Governing Board and the Director-General; 41/

(c) fix, upon the recommendation of the Council, the remuneration of the members of the Governing Board; 42/

41/ Article 160 (2) (c).

42/ Annex IV, article 5 (5).

(d) determine, upon the recommendation of the Governing Board, what portion of the net income of the Enterprise shall be retained as reserves of the Enterprise; 43/

(e) consider and approve, upon the recommendation of the Governing Board of the Enterprise, the rules, regulations and procedures relating to the transfer of funds from the Enterprise to the Authority; 44/

(f) adopt, upon the recommendation of the Council and the advice of the Governing Board, the schedule to repay interest-free loans from States Parties to the Enterprise; 45/

(g) approve draft rules submitted by the Council in respect of the organization, management, appointment and dismissal of staff in accordance with article 15, paragraph 1 (1). 46/

Article 25

The Council

The Council shall:

(a) issue directives to the Enterprise in accordance with article 170 and annex IV, article 2, of the Convention; 47/

(b) recommend to the Assembly candidates for the election of the members of the Governing Board and the Director-General; 48/

(c) recommend to the Assembly the remuneration of the members of the Governing Board; 49/

43/ Annex IV, article 10 (2).

44/ Article 160 (2) (f) (ii).

45/ Annex IV, article 11 (3) (f).

46/ Annex IV, article 6 (1).

47/ Article 162 (2) (i).

48/ Article 162 (2) (c).

49/ Annex IV, article 5 (5).

(d) approve, upon the recommendation of the Governing Board, the ceiling on borrowings of the Enterprise; [50]

(e) appoint the independent auditor referred to in article 30;

(f) approve the delegation by the Governing Board of any non-discretionary powers to the Director-General and to its committees; [51]

(g) approve plans of work submitted by the Governing Board in accordance with Annex IV, article 12, of the Convention, applying, *mutatis mutandis*, the procedures set forth in article 162, paragraph 2 (j), of the Convention; [52]

(h) approve applications submitted by the Governing Board for production authorizations; [53]

(i) receive the annual report of the Governing Board; [54]

(j) consider the reports of the Enterprise and transmit them to the Assembly with its recommendations; [55]

(k) receive from the Governing Board and submit to the Assembly for approval draft rules in respect of the organization, management, appointment and dismissal of staff; [56]

(l) consider and take a decision on the annual reports containing an audited statement of accounts and receive at appropriate intervals a summary statement of the financial position of the Enterprise and a profit and loss statement showing the results of its operations; [57]

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[50] Annex IV, article 11 (2) (a).

[51] Annex IV, article 6 (o).

[52] Article 162 (2) (k).

[53] Annex IV, article 6 (e).

[54] Annex IV, article 6 (k).

[55] Article 162 (2) (g).

[56] Annex IV, article 6 (l).

[57] Annex IV, article 9 (l).

(m) recommend to the Assembly a schedule for the repayment of interest-free loans to the Enterprise from States Parties on the advice of the Governing Board; 58/

(n) approve guidelines with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and the geographically disavantaged among them. 59/

Annotation

(1) It was pointed out that the provision in subparagraph (a) permitted the Council to issue directives with respect to the day-to-day running of the Enterprise - the responsibility of the Director-General - and that it was thus more appropriate to define the powers of the Council in more detail and to clarify the subjects on which directives could be issued and how far they should go.

(2) It was agreed that subparagraph (a) should be interpreted in the context of article 4 (3) of the present paper. This would clarify that the directives only refer to those which the Council would be giving to the Governing Board on policy matters. Since article 4 (3) had been taken from article 2 (2) of Annex IV of the Convention, it was agreed to include a reference in subparagraph (a) to article 2 of Annex IV so that the paragraph would now read as follows: "issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention".

(3) It was agreed to add the words "and take a decision on" after the word "consider" in the first line of subparagraph (l).

Section 10. FINANCES

Article 26

Sources of funds

The funds of the Enterprise shall include:

(a) amounts received from the Authority in accordance with article 173, paragraph 2 (b), of the Convention;

(b) voluntary contributions made by States Parties for the purpose of financing the activities of the Enterprise;

58/ Annex IV, article 11 (3) (f).

59/ Annex IV, article 12 (3) (b) (ii).

(c) funds borrowed by the Enterprise;

(d) income of the Enterprise from its operations;

(e) other funds made available to the Enterprise to enable it to commence operations as soon as possible and to carry out its functions. 60/

Article 27

Borrowing power of the Enterprise

1. The Enterprise shall have the power to borrow funds and to furnish such collateral or other security as it may determine. Before making a public sale of its obligations in the financial markets or currency of a State Party, the Enterprise shall obtain the approval of that State Party. The total amount of borrowings shall be approved by the Council upon the recommendation of the Governing Board.

2. States Parties shall make every reasonable effort to support applications by the Enterprise for loans on capital markets and from international financial institutions. 61/

Article 28

Financing of the first mine site and initial administrative expenses

1. The Enterprise shall be provided with the funds necessary to explore and exploit one mine site and to transport, process and market the minerals recovered therefrom and the nickel, copper, cobalt and manganese obtained, and to meet its initial administrative expenses. 62/

2. All States Parties shall make available to the Enterprise an amount equivalent to one half of the funds referred to in paragraph 1 by the way of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget in force at the time when the assessments

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60/ Annex IV, article 11 (1) (e).

61/ Annex IV, article 11 (2).

62/ The Preparatory Commission should note that the amount of the said funds, and the criteria and factors for its adjustment, shall be included in the draft rules, regulations and procedures of the Authority.

were made, adjusted to take into account the States which are not members of the United Nations. Debt incurred by the Enterprise in raising the other half of the funds shall be guaranteed by all States Parties in accordance with the same scale.

3. If the sum of the financial contributions of States Parties is less than the funds to be provided to the Enterprise under paragraph 1, the Assembly shall, at its first session, consider the extent of the shortfall and adopt by consensus measures for dealing with this shortfall, taking into account the obligations of States Parties under paragraphs 1 and 2, and any recommendations of the Preparatory Commission.

4. (a) Each State Party shall, within 60 days after the entry into force of the Convention, or within 30 days after the deposit of its instruments of ratification or accession, whichever is later, deposit with the Enterprise irrevocable, non-negotiable, non-interest-bearing promissory notes in the amount of the share of such State Party of interest-free loans pursuant to paragraph 2.

(b) The Governing Board shall prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for the activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention.

(c) The States Parties shall thereupon be notified by the Enterprise, through the Authority, of their respective shares in accordance with paragraph 2, required for such expenses. The Enterprise shall encash such amounts of the promissory notes as may be required to meet the expenditure referred to in the schedule with respect to interest-free loans.

(d) States Parties shall, upon receipt of the notification, make available their respective shares of debt guarantees for the Enterprise in accordance with paragraph 2.

5. (a) If the Enterprise so requests, States Parties may provide debt guarantees in addition to those provided in accordance with the scale referred to in paragraph 2.

(b) In lieu of debt guarantees, a State Party may make a voluntary contribution to the Enterprise in an amount equivalent to that portion of the debts which it would otherwise be liable to guarantee.

6. Repayment of the interest-bearing loans shall have priority over the repayment of the interest-free loans. Repayment of interest-free loans shall be in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council and the advice of the Governing Board. In the

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exercise of this function the Board shall be guided by the relevant provisions of the rules, regulations and procedures of the Authority, which shall take into account the paramount importance of ensuring the effective functioning of the Enterprise and, in particular, ensuring its financial independence. 63/

7. Funds made available to the Enterprise shall be in freely usable currencies or currencies which are freely available and effectively usable in the major foreign exchange markets. Except as provided in article 27, no State Party shall maintain or impose restrictions on the holding, use or exchange by the Enterprise of these funds. 64/

Annotation

(1) With respect to paragraph 1, it was pointed out that, in view of the considerable uncertainties surrounding seabed mining, including the size and financial requirements for the initial mine site, it would be difficult to predict with any accuracy the amount of funds that would be required.

(2) It was generally felt that Governments should not be required to make their investments until the operational plan had been drawn up. However, since the Enterprise would need funds to cover its initial administrative expenses, this component of the funds should be budgeted separately. The rest of the funds would be subject to a call-up by the Enterprise when a decision was close with respect to the start-up of the project.

(3) It was further noted that default by a State Party with respect to its contributions to the fund for the first mine site of the Enterprise was a matter quite separate from a default with respect to the Authority's budget and deserved close attention, since the Enterprise would be wholly dependent on these contributions.

Article 29

Funds, assets and expenses

The funds, assets and expenses of the Enterprise shall be kept separate from those of the Authority. This provision shall not prevent the Enterprise from making arrangements with the Authority regarding facilities, personnel

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63/ Annex IV, article 11 (3).

64/ Annex IV, article 11 (3) (g). It should be noted that these currencies will have to be defined in the rules, regulations and procedures of the Authority in accordance with prevailing international monetary practice.

and services and arrangements for reimbursement of administrative expenses paid by either on behalf of the other. 65/

Article 30

Annual audit

The records, books and accounts of the Enterprise, including its annual financial statements, shall be audited annually by an independent auditor appointed by the Council. 66/

Section 11. SETTLEMENT OF DISPUTES

Article 31

Jurisdiction

The Seabed Disputes Chamber shall have jurisdiction in disputes with respect to activities in the Area between parties to a contract, being States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, concerning:

(a) the interpretation or application of a relevant contract or a plan of work, or

(b) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. 67/

Article 32

Interpretation or application of a contract

1. Disputes concerning the interpretation or application of a contract referred to in article 31, subparagraph (a), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which

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65/ Annex IV, article 11 (4).

66/ Annex IV, article 11 (5).

67/ Article 187 (c).

the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, of the Convention, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.

2. If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or proprio motu, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.

3. In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree. 68/

Section 12. LIABILITY

Article 33

Liability

The Enterprise shall not be liable for the acts or obligations of the Authority, nor shall the Authority be liable for the acts or obligations of the Enterprise. 69/

Article 34

Limitation of liability of the members of the Authority

Without prejudice to Annex IV, article 11, paragraph 3, of the Convention, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise. 70/

68/ Article 188 (2).

69/ Annex IV, article 2.

70/ Annex IV, article 3.

Section 13. PRIVILEGES AND IMMUNITIES

Article 35

Position of Enterprise with regard to judicial process

Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territory of a State Party in which the Enterprise:

(a) has an office or facility;

(b) has appointed an agent for the purpose of accepting service or notice of process;

(c) has entered into a contract for goods or services;

(d) has issued securities; or

(e) is otherwise engaged in commercial activity. 71/

Article 36

Immunity of the property and assets

1. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Enterprise. 72/

2. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of seizure by executive or legislative action. 73/

71/ Annex IV, article 13 (3) (a).

72/ Annex IV, article 13 (3) (b).

73/ Annex IV, article 13 (4) (a).

Article 37

Exemption from restrictions, regulations, controls and moratoria

The property and assets of the Enterprise, wherever located and by whomsoever held, shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature. [74]

Article 38

Respect for local laws and regulations

The Enterprise and its employees shall respect local laws and regulations in any State or territory in which the Enterprise or its employees may do business or otherwise act. [75]

Article 39

Rights, privileges and immunities

States Parties shall ensure that the Enterprise enjoys all rights, privileges and immunities accorded by them to entities conducting commercial activities in their territories. These rights, privileges and immunities shall be accorded to the Enterprise on no less favourable a basis than that on which they are accorded to entities engaged in similar commercial activities. If special privileges are provided by States Parties for developing States or their commercial entities, the Enterprise shall enjoy those privileges on a similarly preferential basis. [76]

Annotation

It was pointed out that rights, privileges and immunities were being discussed in informal plenary and that Special Commission 2 should wait on its decision on the Headquarters Agreement and see whether they fit the structure and organization of the Enterprise. It was pointed out that separate agreements were needed between the Enterprise and those State Parties within whose territory the Enterprise established sub-offices. It was noted that the Enterprise was a commercial entity and should be treated like other commercial entities under the most-favoured-nation clause. It was

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[74] Annex IV, article 13 (4) (b).

[75] Annex IV, article 13 (4) (c).

[76] Annex IV, article 13 (4) (d).

/...

agreed that the question of whether the privileges and immunities of the Enterprise should be separated from those of the Authority would depend on what the host country decided.

Article 40

Special incentives, rights, privileges and immunities

States Parties may provide special incentives, rights, privileges and immunities to the Enterprise without the obligation to provide such incentives, rights, privileges and immunities to other commercial entities. 77/

Article 41

Tax status

The Enterprise shall negotiate with the host countries in which its offices and facilities are located for exemption from direct and indirect taxation. 78/

Article 42

Waiver

The Enterprise may waive any of the privileges and immunities conferred upon it under this section or in special agreements concluded by the Enterprise, to such extent and upon such conditions as it may determine. 79/

Section 14. PROCUREMENT

Article 43

Procurement

1. If the Enterprise does not possess the goods and services required for its operations it may procure them. For that purpose, it shall issue invitations to tender and award contracts to bidders offering the best combination of quality, price and delivery time.

77/ Annex IV, article 13 (4) (e).

78/ Annex IV, article 13 (5).

79/ Based upon Annex IV, article 13 (7).

2. If there is more than one bid offering such a combination, the contract shall be awarded in accordance with:

(a) the principle of non-discrimination on the basis of political or other considerations not relevant to the carrying out of operations with due diligence and efficiency; and

(b) guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and geographically disadvantaged among them.

3. The Governing Board may adopt rules determining the special circumstances in which the requirement of invitations to bid may, in the best interests of the Enterprise, be dispensed with. 80/

80/ Annex IV, article 12 (3).

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Special Commission 2
New York, 10-21 August 1992

RECOMMENDED ANNOTATIONS BY SPECIAL COMMISSION 2 ON THE PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE

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INTRODUCTION

1. The present paper contains the recommendations of Special Commission 2 to the plenary of the Preparatory Commission on the structure and organization of the Enterprise. It incorporates working paper 16 (LOS/PCN/SCN.2/WP.16), entitled "Provisions of the Convention relating to the structure and organization of the Enterprise", and the annotations which were made thereto, and also recommends supplementary draft provisions to that working paper.

2. The Special Commission commenced its discussions on the structure and organization of the Enterprise on the basis of working paper 16 at the seventh session in Kingston (27 February - 23 March 1989). Working paper 16 proved to be useful because it is a compendium of all the relevant provisions of the Convention relating to the Enterprise, which are dispersed throughout Part XI and its annexes. It served to identify those provisions of the Convention to which annotations were required to assist the Authority, and subsequently the Enterprise, in making their initial decisions. The working paper also served to identify those elements that would form the substance of recommendations to the Authority on transitional arrangements during the pre-operational stage of the Enterprise. Those recommendations have been finalized and are contained in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1.

3. The Special Commission in its meetings on the question of annotations agreed that, while it could not amend the Convention, it could furnish liberal interpretations of its provisions by way of annotations as long as their basic purpose and intent were not disturbed. It was understood that these annotations would serve several purposes: 1) to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretations; 2) to suggest supplementary draft provisions, if necessary, to facilitate its effective application; and 3) to suggest additional draft rules on matters such as confidentiality, on which the Convention has no rule specific to the Enterprise.

4. In general, the Special Commission addressed the need to preserve maximum autonomy for the fully-fledged Enterprise and flexibility in its operations, in keeping with its basic commercial character and the need to ensure efficient management and a streamlined structure.

5. There was general agreement that in the relationship between the Governing Board and the Council/Assembly, it will be important to avoid placing unnecessary constraints on the Enterprise. Here, it was also emphasized that the directives given to the Enterprise should be limited to those of a political character, while commercial considerations would be the exclusive concern of the Governing Board of the Enterprise. The Enterprise, it was stressed, would need to be businesslike in its dealings and be protected against pressures from the Authority. In order to avoid interference in the day-to-day operations of the Enterprise by the Governing Board, it was pointed out that the Director-General required independence.

/...

It was also noted that it would be important for the mining code to avoid introducing constraints on the Enterprise, e.g., with respect to its procedures for the acquisition of technology.

6. The Special Commission completed its discussions of working paper 16 at the ninth session in Kingston (25 February - 22 March 1991) and requested the Secretariat to issue a new paper which would not only incorporate the provisions of the Convention relating to the structure and organization of the Enterprise as contained in working paper 16, but would also contain the annotations which were made to that working paper. That paper was issued as document LOS/PCN/SCN.2/L.8 at the summer session in New York (12-30 August 1991) but did not become the subject of discussion until the tenth session in Kingston (24 February - 13 March 1992). Following an article-by-article reading of document L.8, the Special Commission decided that some additional annotations to working paper 16 would need to be included and that document L.8 should therefore be revised. The Special Commission also decided to incorporate the statement which was made by the Group of Six at the tenth session, explaining why they wished to reserve their position on document L.8.

7. In its statement the Group of Six pointed out that contrary to the expectations held during the Third United Nations Conference on the Law of the Sea, the prospects for the commercial production of minerals from the deep seabed had receded into the next century. Therefore, there would be no deep seabed mining immediately after the entry into force of the Convention. There would instead be a longer period of yet undetermined length between the entry into force of the Convention and the time when deep seabed mining became economically viable. Furthermore, approaches to economic issues at national and international levels had undergone a considerable transformation in favour of market economy principles. Consequently there was a growing acceptance that the Enterprise should operate on purely commercial terms and that its first mining operation should be carried out as a joint venture together with other deep seabed mining companies. All these developments underscored that the provisions of the Convention relating to the Enterprise had been overtaken by events and therefore needed to be changed. Other developments affecting these provisions would occur probably during the interim period, i.e., between the entry into force of the Convention and the time that deep seabed mining became economically viable. It was, in the opinion of the Group of Six, premature to take any decision now regarding the detailed structure and organization of the Enterprise. That would of course be regulated when deep seabed mining became effectively possible and when one had a clear picture of the conditions under which deep seabed mining would be carried out. Consequently, the Group thought that it was inappropriate at this moment to annotate provisions of which one did not know whether and under which circumstances they would be applied.

8. On the basis of the discussions on the various articles in working paper 16, Special Commission 2 found that annotations were called for with respect to a number of articles. Changes which were made to the articles themselves are underscored in the text that follows.

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PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE AND RECOMMENDED ANNOTATIONS THEREON

Article 1

Use of terms

For the purposes of these articles:

(1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;

(2) "Authority" means the International Seabed Authority;

(3) "activities in the Area" means all activities of exploration for, and exploitation of, the resources of the Area;

(4) "Convention" means the United Nations Convention on the Law of the Sea;

(5) "Secretary-General" means the Secretary-General of the Authority;

(6) "debt guarantee" means a promise of a State Party to creditors of the Enterprise to pay, pro rata in accordance with the appropriate scale, the financial obligations of the Enterprise covered by the guarantee following notice by the creditors to the State Party of a default by the Enterprise. Procedures for the payment of those obligations shall be in conformity with the rules, regulations and procedures of the Authority; [1]

(7) "States Parties" have the same meaning as in article 1, paragraph 2, of the Convention;

(8) "Director-General" means the Director-General of the Enterprise.

(9) "Governing Board" means the Governing Board of the Enterprise.

Annotation

(1) The Special Commission agreed that the definition of "Governing Board" should be included in the article. Working paper 16 was thus amended to include a new paragraph 9. The Special Commission decided not to include a definition of the term "nucleus Enterprise", since the definition and functions of the nucleus Enterprise are contained in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1.

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[1] Annex IV, article 11 (3) (h).

(2) In paragraph 6 the more general question of how the Enterprise is to be financed was raised in the event that the major contributors (based on the United Nations scale of assessments) do not join. It was noted that the following questions would need to be addressed: whether payment by a State Party of the debt would be treated as a loan to the Enterprise, and if so, whether it was an interest-bearing loan or not; and whether a debt was convertible or not.

Section 1. ESTABLISHMENT OF THE ENTERPRISE

Article 2

Establishment

There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1, of the Convention. 2/

Section 2. PURPOSES OF THE ENTERPRISE

Article 3

Purposes of the Enterprise

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2 (a), of the Convention, as well as the transporting, processing and marketing of minerals recovered from the Area. 3/

2. In carrying out its purposes and its functions, the Enterprise shall not interfere in the political affairs of any State Party, nor shall it be influenced in its decisions by the political character of the State Party concerned. 4/

3. Only commercial considerations shall be relevant to its decisions, and these considerations shall be weighed impartially in order to carry out the purposes specified in Annex IV, article 1, of the Convention. 5/

2/ Article 158 (2).

3/ Article 170 (1).

4/ Annex IV, article 12 (7).

5/ Annex IV, article 12 (7).

/...

Annotation

(1) This article was described as one which lent itself to flexible interpretation. It was pointed out that paragraph 1 required modification in order to make it more reasonable in the face of current realities and to ensure compatibility with paragraph 3. It was suggested that the Enterprise would initially do less than what was laid down in the Convention, possibly only monitoring, training, pre-feasibility studies, including studies of operational options. Functions could be assigned to the nucleus Enterprise to be carried out in various stages. It was decided that those questions were best dealt with under a transitional arrangement.

(2) Discussions on paragraph 3 centred on whether the Enterprise should take its decisions only on the basis of "commercial considerations". While some agreed with this, others suggested that profit earning should not be its sole motive, because the Enterprise was there for the common good and it should be a leader in deep seabed mining. It was further suggested that, as a result of the need to preserve the marine environment, the Enterprise should in its decisions take into account any relevant regulatory requirements. While the need to protect and preserve the marine environment enjoyed the full support of the Special Commission, it was pointed out that paragraph 3 was not the place in which to reflect this concern since that paragraph contained the principle on the basis of which the Enterprise was to operate. The need to protect and preserve the marine environment, it was therefore suggested, should be reflected in the provisions regarding the implementation of the functions of the Enterprise.

(3) Some questioned the subdivision of paragraphs 2 and 3 since care had been taken at the time of the Conference not to do so, while others considered it to be a good idea to separate the commercial aspects from the political ones. There was general agreement that decisions relating to political matters should only be made by the Council or the Assembly.

(4) It was thought that the area of commercial considerations should be left broad. It would be unrealistic to expect the Enterprise to operate only on sound commercial principles in its initial stage, when it would be more concerned with monitoring and research operations. In this connection, it was observed that the meaning of sound commercial principles today included pre-operational work on research and development. This observation was followed by a general discussion on whether the Enterprise should in its initial phase engage in research and development of technology, or whether it should acquire it through transfer of technology. Questions of costs were raised if the Enterprise were to set up its own research and development unit. Some suggested that the Enterprise should concentrate its initial efforts on monitoring the activities of the registered pioneer investors and others engaged in seabed mining. It was recognized that initially the Enterprise would need only a small research and development unit, maybe one or two professional staff, leaving room for expansion later.

(5) It was agreed that the reference in paragraph 3 should not be to paragraph 1 but to Annex IV, article 1, of the Convention because it would otherwise result in an inconsistency with the Convention's direction on the matter.

/...

Section 3. LEGAL PERSONALITY

Article 4

Legal personality

1. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is necessary for the exercise of its functions and the fulfilment of its purposes as is provided for in the Statute set forth in Annex IV and, in particular, the capacity: 6/

(a) to enter into contracts, joint arrangements or other arrangements, including agreements with States and international organizations;

(b) to acquire, lease, hold and dispose of immovable and movable property;

(c) to be a party to legal proceedings; 7/

(d) to loan money, issue guarantees and use its credit;

(e) to acquire, hold, use and dispose of shares or other interests in, or obligations of, corporations, associations, partnerships, trusts or other enterprises, or any obligations of a Government;

(f) to pay pension and establish pension plans, profit sharing and other incentive plans for its staff;

(g) to indemnify the members of the Governing Board, the Director-General, officials and staff; and

(h) to exercise such powers incidental to its business as shall be necessary. 8/

2. The Enterprise shall act in accordance with the Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. 9/

6/ Article 170 (2); Annex IV, article 13 (2).

7/ Annex IV, article 13.

8/ Annex IV, article 12 (6).

9/ Article 170 (2).

/...

3. Subject to paragraph 2, the Enterprise shall enjoy autonomy in the conduct of its operations. 10/

Annotation

(1) The opinion was expressed that the functions outlined in paragraph 1 (d) and (e) should not be under the purview of the Enterprise, but should be left to the Council or Assembly. Given current realities, it was pointed out that there was no reason for the Enterprise to undertake these functions since they would not be required in the foreseeable future at any rate. It was proposed that the Enterprise should give the proceeds from its operations to those that need it and not reinvest it; reinvestments, it was suggested, might result in benefits being denied to a larger community. On the other hand it was stated that most businesses needed the freedom to carry out the functions contained in paragraph 1 (d) and (e) and that they constituted general practice. It was pointed out that the Enterprise should not be strait-jacketed by provisions which prevented it from playing the market and maximizing its profits. Functions like these would also ensure the Enterprise's autonomy.

(2) Clarification was sought as to what is meant by "or any obligations of a Government" in paragraph 1 (e). It was noted that the guiding part of subparagraph (e) was its first line, i.e., "to acquire, hold, use and dispose of shares or other interests in," the implication being that the Enterprise can also deal with Governments. In that connection it was noted that this should not be a function of the Governing Board. The suggestion was made that a term other than "obligations" might be more suitable.

(3) One delegation believed that the functions contained in paragraph 1 (d)-(h) should be deleted because they were details of a contract and were subject to contractual arrangements which were provided for in paragraph 1 (a).

Section 4. PLACE OF BUSINESS

Article 5

Place of business

1. The Enterprise shall have its principal office at the seat of the Authority. 11/

10/ Annex IV, article 2 (2).

11/ Annex IV, article 8.

2. The Governing Board may establish in the territory of any State Party with the consent of that State Party other offices and facilities as it deems necessary for the exercise of the functions of the Enterprise. 12/

Section 5. STRUCTURE OF THE ENTERPRISE

Article 6

Structure

The Enterprise shall have a Governing Board, a Director-General and the staff necessary for the exercise of its functions. 13/

Annotation

Attention was given to the relationship between the Director-General and his staff, with emphasis on the need for the Director-General to have full control over day-to-day operations. It was agreed that the power to appoint and dismiss staff must be at his discretion.

Section 6. THE GOVERNING BOARD

Article 7

Convening of first meeting

The first meeting of the Governing Board shall be convened by the Secretary-General within [...] following the date on which the Convention enters into force.

Article 8

Frequency of meetings

The Governing Board shall meet as often as the business of the Enterprise may require. 14/

12/ Annex IV, article 8.

13/ Annex IV, article 4.

14/ Annex IV, article 5 (6).

/...

Article 9

Place of meeting

The Governing Board shall normally function at the principal office of the Enterprise. 15/

Article 10

Membership

1. The Governing Board shall be composed of 15 members elected in accordance with article 24, subparagraph (b). 16/

2. Members of the Board shall act in their personal capacity. In the performance of their duties they shall not seek or receive instructions from any Government or from any other source. 17/

Annotation

(1) It was pointed out that a time-frame would need to be set for the first election of the members of the Governing Board. In this connection, it was noted that it will be up to the Authority to decide when that election should take place.

(2) One delegation was of the view that, in conformity with article 5, paragraph 1 of Annex IV, paragraph 1 of article 10 should be followed by the provision contained in article 11.

Article 11

Equitable geographical distribution and the representation of special interests

In the election of members of the Governing Board, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. 18/

15/ Annex IV, article 5 (6).

16/ Annex IV, article 5 (1).

17/ Annex IV, article 5 (4).

18/ Based upon article 163 (4).

/...

Annotation

The reference to "special interests" in the article was a source of difficulty. Some favoured the deletion of this reference while reserving their position on the question of the representation of land-locked and geographically disadvantaged States. It was noted that while the Secretariat had made a reasonable analogy to the election of other bodies of the Authority, namely the Commissions, the reference to "special interests" should, none the less, be deleted in the absence of a direct guideline in the Convention. It was noted that article 5 (1) of Annex IV only referred to the principle of equitable geographical distribution. Furthermore, it was argued that since the members of the Governing Board should act in their personal capacity there was no need for the criteria of special interests. It was therefore proposed that the reference in footnote 18 be changed to article 5 (1) of Annex IV instead of article 163 (4). Some delegations felt that there should be a definition of "special interests". Attention was drawn to the second sentence of article 161, paragraph 1 (d) of the Convention on the composition, procedure and voting of the Council which provides as follows: "The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States". Others opposed the deletion of the reference to "special interests" and a consequent change in footnote 18. Another member considered it important to retain the reference in view of the position of land-locked and geographically disadvantaged States.

Article 12

Nominations

In submitting nominations of candidates for election to the Governing Board, members of the Authority shall bear in mind the need to nominate candidates of the highest standard of competence, with qualifications in relevant fields, so as to ensure the viability and success of the Enterprise. 19/

Annotation

It was pointed out that the reference to "relevant fields" would require elaboration. In this connection it was observed that candidates should have technical and relevant practical experience. It was suggested that this should be made explicit in the article. It was noted that guidance as to some of the types of expertise required may be inferred from the table in

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19/ Annex IV, article 5 (1).

/...

document LOS/PCN/BUR/R.6, i.e., the report of the Group of Technical Experts to the General Committee, in which are outlined the priority disciplines which training should address. It was emphasized that a combination of expertise be represented on the Governing Board, for example, financial accounting and administrative and project management.

Article 13

Term of office

1. Members of the Governing Board shall be elected for four years and may be re-elected; and due regard shall be paid to the principle of rotation of membership. 20/

2. Members of the Governing Board shall continue in office until their successors are elected. 21/

3. If the office of a member of the Board becomes vacant, the Assembly shall, in accordance with article 24, subparagraph (b), elect a new member for the remainder of his predecessor's term. 22/

Annotation

(1) With respect to paragraph 1, it was proposed that an arrangement should be found to rotate the membership of the Governing Board in such a way as to ensure continuity, e.g. by re-electing one third of the members for a second term and rotating two thirds. It was noted that this was the practice of most institutions. One delegation believed that the members of the Governing Board should only be re-elected once so as to ensure a rotation of the membership.

(2) Following the discussions on articles 16, 17 and 18, and specifically the need to deal with the problem of repeated absenteeism without good reason, it was suggested that an annotation could be made under paragraph 3 to the effect that a member who was absent without good cause for three, four or five statutory meetings of the Board would be disqualified.

20/ Annex IV, article 5 (2).

21/ Annex IV, article 5 (3).

22/ Annex IV, article 5 (3).

Article 14

Remuneration

Each member of the Governing Board shall receive remuneration to be paid out of the funds of the Enterprise. The amount of remuneration shall be fixed by the Assembly, upon the recommendation of the Council. 23/

Article 15

Powers and functions of the Governing Board

1. The Governing Board shall direct the operations of the Enterprise. Subject to the Convention, the Board shall exercise the powers necessary to fulfil the purposes of the Enterprise, including powers: 24/

(a) to elect a Chairman from among its members;

(b) to adopt its rules of procedure;

(c) to draw up and submit formal written plans of work to the Council in accordance with article 153, paragraph 3, and article 162, paragraph 2 (j), of the Convention;

(d) to develop plans of work and programmes for carrying out the activities specified in article 170 of the Convention;

(e) to prepare and submit to the Council applications for production authorizations in accordance with article 151, paragraphs 2 to 7, of the Convention;

(f) to authorize negotiations concerning the acquisition of technology, including those provided for in Annex III, article 5, paragraph 3 (a), (c) and (d), of the Convention, and to approve the results of those negotiations;

(g) to establish terms and conditions, and to authorize negotiations, concerning joint ventures and other forms of joint arrangements referred to in Annex III, articles 9 and 11, of the Convention, and to approve the results of such negotiations;

(h) to recommend to the Assembly what portion of the net income of the Enterprise should be retained as its reserves in accordance with article 160, paragraph 2 (f), and Annex IV, article 10, of the Convention;

23/ Annex IV, article 5 (5).

24/ Annex IV, article 6.

/...

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(i) to approve the annual budget of the Enterprise;

(j) to authorize the procurement of goods and services in accordance with Annex IV, article 12, paragraph 3, of the Convention;

(k) to submit an annual report to the Council in accordance with Annex IV, article 9, of the Convention;

(l) to submit to the Council for the approval of the Assembly draft rules in respect of the organization, management, appointment and dismissal of the staff of the Enterprise and to adopt regulations to give effect to such rules;

(m) to borrow funds and to furnish such collateral or other security as it may determine in accordance with Annex IV, article 11, paragraph 2, of the Convention;

(n) to enter into any legal proceedings, agreements and transactions and to take any other actions in accordance with Annex IV, article 13, of the Convention;

(o) to delegate, subject to the approval of the Council, any non-discretionary powers to the Director-General and to its committees;

(p) to nominate the Director-General for recommendation by the Council and election by the Assembly; 25/

(q) to recommend to the Council the ceiling on the Enterprise's borrowings; 26/

(r) to prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention; 27/

(s) to prepare a funding schedule for the repayment of the interest-free loans to the Enterprise from States Parties to be adopted by the Assembly on the recommendation of the Council. 28/

25/ Annex IV, article 7 (1).

26/ Annex IV, article 11 (2) (a).

27/ Annex IV, article 11 (3) (d) (ii).

28/ Annex IV, article 11 (3) (f).

/...

2. In addition, the Governing Board shall:

   (a) establish procurement rules, regulations and procedures in accordance with article 43; [29]

   (b) establish reporting requirements and procedures pursuant to Annex IV, article 9, of the Convention;

   (c) set out procedures for funding pursuant to Annex IV, article 11, of the Convention;

   (d) provide procedures for the approval of the annual budget pursuant to article 15, paragraph 1 (i);

   (e) establish accounting and internal audit procedures.

Annotation

(1) The general question was raised as to whether there was any point in electing the Governing Board upon the establishment of the Enterprise if the current economic conditions persisted, since it would end up being a burden on the budget of the Authority. The opinion was expressed that it was necessary to elect a Governing Board upon the establishment of the Enterprise, in order for it to determine policy decisions which the Enterprise would implement, but that the frequency of the Board's meetings in the initial stages could be significantly reduced.

(2) It was noted that article 15, listing 20 functions of the Governing Board, was difficult to relate to the need for flexible management and a dynamic Director-General.

(3) With respect to paragraph 1 (b), the question was raised as to whether it was up to Special Commission 2 to prepare rules of procedure for the Governing Board. It was pointed out that the Board has been given the authority to determine its own rules of procedure and that Special Commission 2 was not to make binding rules for the Board but only recommendations in its annotations. It was suggested that the Governing Board should include in its rules of procedure some rules regarding the length of the term of office of the Chairman, the question of rotation of the Chairman and the members of the Governing Board as well as the question of equitable geographical distribution on the Board.

(4) Following the discussions on articles 16, 17 and 18, it was suggested that the Governing Board should in its rules of procedure take into account the possibility of consultations on non-substantive matters being undertaken by the Chairman and some of the members of the Board outside of the framework of a meeting of the Board. This procedure would, for example, apply to

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[29] Annex IV, article 12 (3).

budgetary matters which did not involve any additional expenses. The Chairman could communicate with the members by mail and obtain their views on such matters.

(5) Since the Convention was silent on the subject of vice-chairmen, it was also pointed out that it was usual practice to provide for one or two vice-chairmen in the event that the Chairman was unable to attend meetings of the Board.

(6) There was extensive discussion on paragraph 2 (e) and the question of whether the Governing Board should establish its own internal audit and accounting procedures or whether this should be left to the Authority. While it was considered necessary to allow the Board the freedom to decide on the internal audit procedures which should be followed since the internal audit was essentially there for the benefit of the Director-General - it is his internal check system or early watchdog unit - no agreement could be reached on the question of whether the Governing Board should establish its own accounting procedures.

(7) While it was agreed that it was the Council which would draw up accounting rules, it was pointed out that there was no provision in the Convention which specifically authorized the Council to establish accounting procedures. The view was expressed that approval should be given by the Council for the Governing Board to establish accounting procedures for the Enterprise and that this should be listed as a function of the Council under article 25. Since the Enterprise would also be engaged in commercial operations, it was suggested that its accounting rules and procedures should closely follow those developed for contractors. It was pointed out that the decision on accounting procedures for the Enterprise should await the results of the ongoing discussions on the subject in relation to the contractor in Special Commission 3, since at its conclusion a set of accounting rules and procedures were to be appended to the contract. It was further noted that if Special Commission 3 accepted the accounting principles and procedures contained in document LOS/PCN/SCN.3/WP.6/Add.7 they would be part of the generally recognized accounting principles in accordance with which the Enterprise was to establish its accounting procedures. Another view was that the Enterprise had the autonomy to establish its own accounting procedures without obtaining approval from the Council. Reference was also made to article 30 where provision was made for an annual audit by an independent auditor appointed by the Council. A proposal was made to subdivide subparagraph (e) into new subparagraphs (e) and (f) as follows:

> "(e) establish accounting procedures in accordance with generally recognized accounting principles;
>
> "(f) establish internal audit procedures."

(8) It was pointed out that most companies' accounting procedures were based on accounting principles in use and that the accounting procedures conformed to a general format. The phrase "in accordance with generally recognized accounting principles" is a standard phrase which applies to a large number of countries in the world and has a standing in the professional community of accountants.

/...

Article 16

Quorum for meetings

Two thirds of the members of the Governing Board shall constitute a quorum. 30/

Article 17

Voting rights

Each member of the Governing Board shall have one vote. 31/

Article 18

Decision-making

1. All matters before the Governing Board shall be decided by a majority of its members. If a member has a conflict of interest on a matter before the Board he shall refrain from voting on that matter. 32/

2. Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement.

3. [Deleted]

Annotation to articles 16, 17 and 18

(1) There was extensive discussion on the possibility of delaying decisions if only two-thirds of the members of the Governing Board were able to attend a meeting of the Board and a decision had to be taken by a majority. Two suggestions were made to deal with the problem: first, that proxy voting should be permitted; and second, that the Governing Board could provide in its rules of procedure that where a decision had to be taken by a quorum the decision of a member who could not be present had to be confirmed by a postal ballot. It was observed that proxy voting was only possible if there was a quorum. In this connection it was pointed out that it was the responsibility of the Chairman to ensure that the members of the Board were able to attend a meeting. It was recognized that once a quorum was established and a decision needed to be taken by a majority, proxy voting should be permitted where it

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30/ Annex IV, article 5 (7).

31/ Annex IV, article 5 (8).

32/ Annex IV, article 5 (8).

/...

was not possible to get a majority. Advanced information on matters which would be discussed at the meeting would have to be sent to the members of the Governing Board so that the members voting by proxy would have all the necessary information. The Special Commission understood the term "majority" in paragraph 1 of article 18 to mean a majority of the members of the Governing Board.

(2) It was stressed that the problem of repeated absenteeism of members of the Governing Board, without good reason, would require some disciplinary measures. It was suggested that an annotation could be made to this effect under article 13 (3).

(3) With respect to the issue of conflict of interest in the second sentence of paragraph 1 of article 18, it was recognized that where a member had or acquired in the future an interest in the matter being voted on, a legal obligation to refrain from voting, rather than a provision which appealed to his morality, was called for. It was suggested that the Governing Board should in cases of doubt determine by a majority whether or not there was in fact a conflict of interest.

(4) It was observed that since paragraph 2 of article 18 did not derive from the Convention, the provision should be hortatory and not obligatory in respect of arriving at decisions on the basis of consensus or general agreement. It was decided to delete paragraph 3 which contained the definition of "consensus". The Special Commission agreed to reword paragraph 2 as follows: "Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement".

Section 7. THE DIRECTOR-GENERAL AND THE STAFF OF THE ENTERPRISE

Article 19

The Director-General

1. The Director-General shall be elected in accordance with article 24, subparagraph (b).

2. The Director-General shall not be a member of the Governing Board.

3. The Director-General shall hold office for a fixed term, not exceeding five years, and may be re-elected for further terms. 33/

33/ Annex IV, article 7 (1).

Annotation

One delegation held the view that the Director-General should serve no more than two terms.

Article 20

Functions and duties of the Director-General

1. The Director-General shall act as the legal representative and chief executive of the Enterprise and shall be directly responsible to the Governing Board for the conduct of the operations of the Enterprise.

2. The Director-General shall be responsible for the organization, management, appointment and dismissal of the staff of the Enterprise in accordance with the rules and regulations referred to in article 15, paragraph 1 (l).

3. The Director-General shall participate, without the right to vote, in the meetings of the Governing Board and may participate, without the right to vote, in the meetings of the Assembly and the Council when these organs are dealing with matters concerning the Enterprise. 34/

Annotation

One delegation supported the incorporation into this article of the provision contained in article 22 so as to ensure that the Director-General would not seek or receive instructions from any Government or from any other source external to the Enterprise.

Article 21

The staff of the Enterprise

1. The staff of the Enterprise shall be appointed by the Director-General. The terms and conditions on which they shall be appointed, remunerated and dismissed shall be in accordance with the rules and regulations referred to in article 15, paragraph 1 (l). 35/

34/ Annex IV, article 7 (2).

35/ Based upon article 167 (3).

/...

2. The staff of the Enterprise shall consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Enterprise. 36/

3. The paramount consideration in the recruitment and employment of the staff and in the determination of their conditions of service shall be the necessity of securing the highest standards of efficiency and of technical competence. Subject to this consideration, due regard shall be paid to the importance of recruiting the staff on an equitable geographical basis. 37/

4. The responsibilities set forth in article 168, paragraph 2, of the Convention are equally applicable to the staff of the Enterprise. 38/

Annotation

One delegation supported the incorporation into this article of the provision contained in article 22 so as to ensure that the staff would not seek or receive instructions from any Government or from any other source external to the Enterprise.

Article 22

International character of the Director-General and the staff

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any Government or from any other source external to the Enterprise. They shall refrain from any action which might reflect on their position as international officials of the Enterprise responsible only to the Enterprise. Each State Party undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities. 39/

36/ Based upon article 167 (1).

37/ Annex IV, article 7 (3).

38/ Annex IV, article 7 (5).

39/ Annex IV, article 7 (4).

Section 8. CONFIDENTIALITY

Article 23

Confidentiality

1. The members of the Governing Board and the Director-General and the staff of the Enterprise shall not disclose, even after the termination of their functions as such, any confidential information coming to their knowledge by reason of their duties on or in relation to the Enterprise.

2. The duty of the members of the Governing Board and the Director-General and the staff of the Enterprise not to disclose confidential information constitutes both an obligation in respect of the individual's appointment or employment for the purposes of the Enterprise and a personal responsibility entailing financial liability. In addition to being liable to any financial or other sanction, any person who has disclosed confidential information in breach of his duty in that behalf shall cease to exercise any function in relation to the receipt or custody of confidential information and shall be disqualified from being re-elected or reappointed to exercise any such function. 40/

Annotation

(1) It was agreed that the rule suggested by the Secretariat (based on rule 16 in LOS/PCN/WP.24 of September 1984) would require redrafting and expansion and that it would also need to apply in the transitional period. It was thought that the drafting of a rule on confidentiality should not be left to the Enterprise as it might draft it to suit its own purposes.

(2) There was agreement that the rule should establish the basic principle, applicable to the Enterprise as a whole. It was suggested that this principle could incorporate the wording of article 168 (2) of the Convention. With respect to the mechanism for observance of this principle, it was pointed out that article 14 (3) of Annex III provided a juridical basis for confidentiality.

(3) It was proposed that provision should be made for the signing of a confidentiality clause or agreement at the time of employment. All that was needed was a signature which attested that a person had accepted the confidentiality clause and a provision providing for a penalty in case of breach. Whether there should be an oath or detailed staff rules would need to be worked out. It was pointed out that where there were no provisions for sanctions in municipal law, workers were often required to take an oath, e.g., under the Official Secrets Act.

40/ LOS/PCN/WP.24, rule 16.

(4) It was agreed that a differentiation should be made between management and staff. It was pointed out that it would be necessary to separate the responsibility of the management of the Governing Board from that of the Director-General. A uniform principle should, however, be applicable in both cases, but the terms might need to be different. The Director-General, since he was an intermediary position but in some respects also a civil servant, would in case of breach be directly responsible, by virtue of his function or title alone. It was considered that the rule with respect to the Director-General, as manager, should be as rigid as that for the staff. It was proposed that a distinction should be made between staff with access to confidential information in the course of their normal duties and those without such access.

(5) It was proposed that in paragraph 1 the term "staff of the Enterprise" needed to be defined so as to make it clear that the provision applied to all staff, whether permanent, short-term, temporary staff or consultants. It was suggested that in the case of independent contractors an agreement could be drawn up with the Enterprise which would exempt the Enterprise from any liability for their acts.

(6) It was proposed that paragraph 2 should state that the Enterprise and its officers and staff were jointly and severally liable for any damages for breach of the obligations set forth in paragraph 1.

(7) It was pointed out that as the requirement of confidentiality is provided for in the Convention in the Authority itself, each of the executive bodies, i.e., the Council and Governing Board, had the responsibility not only not to disclose confidential information but also to provide the mechanism to prevent this from happening.

(8) The question was raised as to which organ had the competence to establish financial liabilities and their extent. It was pointed out that the Director-General would be responsible for sanctions with respect to the staff. The Governing Board would be responsible for sanctions with respect to the Director-General and the Authority would be responsible with respect to the Governing Board. It was noted that it would be necessary to provide for a graduation of sanctions as breaches took place at different levels and might vary in magnitude.

(9) It was agreed that the obligation not to disclose confidential information should also cover the post-employment period. In this connection it was pointed out by one delegation that the words "as such" in paragraph 1 required clarification.

(10) The question was raised as to the power of the Governing Board to impose sanctions for the post-employment period. It was agreed that these sanctions should differ from those for the employment period and be of a financial or penal nature depending on the extent of the breach caused. However, it was also agreed that a former employee should not be held liable in perpetuity and be made a prisoner of his conscience and thus be stopped from earning a living. An analogy was drawn to the situation in municipal

/...

law where contracts in restraint of trade were intended to prevent the exploitation of trade secrets learned by the employee in the course of his employment.

(11) Several problems were highlighted in connection with the implementation of an enforcement mechanism, particularly if a breach occured after termination of employment, in which case national legislation would then be applicable. It was pointed out that some national systems had no sanctions and that there might be a problem in asking Governments to provide for such sanctions in their national laws. It was also pointed out that there might be a problem with implementing financial liability for breach of personal responsibility in case of bankruptcy. In this connection, it was suggested that the Enterprise could set up a fund akin to that which existed in national systems where insurance institutions provided coverage. While it was thought that there was no problem in setting up a fund for the staff, it was considered difficult to do the same for the members of the Governing Board as it would be hard to assess their collective and individual responsibility. It was pointed out that an insurance policy for staff would not be a real sanction and that it might be preferable to have a fidelity bond - financed through a deduction from the employees' salary - which would be forfeited once a staff member was found guilty of disclosing confidential information. Another option would be to dismiss the person concerned. One delegation expressed support for this last option and thought that the provision in paragraph 2 was not explicit enough to ensure that if a member of the Governing Board, the Director or a member of the staff of the Enterprise violated the confidentiality rule they would be dismissed immediately.

(12) It was agreed that not only the violator but also the beneficiary of a violation should be punished through financial, penal or quasi-disciplinary administrative sanctions. If the recipient of the confidential information was a contractor or subcontractor, the party concerned could be disqualified. If he was an outsider or third company which had found out what the other competitors had bid in order to secure the award of a contract, then appropriate sanctions could be disqualification or blacklisting for the future. He would thus be debarred from conducting business with the Enterprise in the future.

Section 9. RELATIONSHIP OF THE ENTERPRISE TO THE ASSEMBLY AND TO THE COUNCIL OF THE AUTHORITY

Article 24

The Assembly

The Assembly shall:

(a) establish general policies for the Enterprise pursuant to article 170, paragraph 2, and Annex IV, article 2, paragraph 1, of the Convention;

/...

(b) elect, upon the recommendation of the Council, the members of the Governing Board and the Director-General; 41/

(c) fix, upon the recommendation of the Council, the remuneration of the members of the Governing Board; 42/

(d) determine, upon the recommendation of the Governing Board, what portion of the net income of the Enterprise shall be retained as reserves of the Enterprise; 43/

(e) consider and approve, upon the recommendation of the Governing Board of the Enterprise, the rules, regulations and procedures relating to the transfer of funds from the Enterprise to the Authority; 44/

(f) adopt, upon the recommendation of the Council and the advice of the Governing Board, the schedule to repay interest-free loans from States Parties to the Enterprise; 45/

(g) approve draft rules submitted by the Council in respect of the organization, management, appointment and dismissal of staff in accordance with article 15, paragraph 1 (l). 46/

Annotation

It was noted by one delegation that the words "inter alia" should be added after the words "The Assembly shall", since in the future the Assembly may have other functions in relation to the Enterprise.

Article 25

The Council

The Council, shall:

41/ Article 160 (2) (c).

42/ Annex IV, article 5 (5).

43/ Annex IV, article 10 (2).

44/ Article 160 (2) (f) (ii).

45/ Annex IV, article 11 (3) (f).

46/ Annex IV, article 6 (1).

/...

(a) issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention; 47/

(b) recommend to the Assembly candidates for the election of the members of the Governing Board and the Director-General; 48/

(c) recommend to the Assembly the remuneration of the members of the Governing Board; 49/

(d) approve, upon the recommendation of the Governing Board, the ceiling on borrowings of the Enterprise; 50/

(e) appoint the independent auditor referred to in article 30;

(f) approve the delegation by the Governing Board of any non-discretionary powers to the Director-General and to its committees; 51/

(g) approve plans of work submitted by the Governing Board in accordance with Annex IV, article 12, of the Convention, applying, *mutatis mutandis*, the procedures set forth in article 162, paragraph 2 (j), of the Convention; 52/

(h) approve applications submitted by the Governing Board for production authorizations; 53/

(i) receive the annual report of the Governing Board; 54/

(j) consider the reports of the Enterprise and transmit them to the Assembly with its recommendations; 55/

47/ Article 162 (2) (i).

48/ Article 162 (2) (c).

49/ Annex IV, article 5 (5).

50/ Annex IV, article 11 (2) (a).

51/ Annex IV, article 6 (o).

52/ Article 162 (2) (k).

53/ Annex IV, article 6 (e).

54/ Annex IV, article 6 (k).

55/ Article 162 (2) (g).

/...

(k) receive from the Governing Board and submit to the Assembly for approval draft rules in respect of the organization, management, appointment and dismissal of staff; 56/

(l) consider and take a decision on the annual reports containing an audited statement of accounts and receive at appropriate intervals a summary statement of the financial position of the Enterprise and a profit and loss statement showing the results of its operations; 57/

(m) recommend to the Assembly a schedule for the repayment of interest-free loans to the Enterprise from States Parties on the advice of the Governing Board; 58/

(n) approve guidelines with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and the geographically disavantaged among them. 59/

Annotation

(1) It was pointed out that the provision in subparagraph (a) permitted the Council to issue directives with respect to the day-to-day running of the Enterprise - the responsibility of the Director-General - and that it was thus more appropriate to define the powers of the Council in more detail and clarify the subjects on which directives could be issued and how far these should go.

(2) It was agreed that subparagraph (a) should be interpreted in the context of article 4 (3) of the present paper. This would clarify that the directives only refer to those which the Council would be giving to the Governing Board on policy matters. Since article 4 (3) had been taken from article 2 (2) of Annex IV of the Convention, it was agreed to include a reference in subparagraph (a) to article 2 of Annex IV so that the paragraph would now read as follows: "issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention."

(3) It was agreed to add the words "and take a decision on" after the word "consider" in the first line of subparagraph (l).

56/ Annex IV, article 6 (1).

57/ Annex IV, article 9 (1).

58/ Annex IV, article 11 (3) (f).

59/ Annex IV, article 12 (3) (b) (ii).

Section 10. FINANCES

Article 26

Sources of funds

The funds of the Enterprise shall include:

(a) amounts received from the Authority in accordance with article 173, paragraph 2 (b), of the Convention;

(b) voluntary contributions made by States Parties for the purpose of financing the activities of the Enterprise;

(c) funds borrowed by the Enterprise;

(d) income of the Enterprise from its operations;

(e) other funds made available to the Enterprise to enable it to commence operations as soon as possible and to carry out its functions. 60/

Annotation

One delegation noted that the voluntary contributions referred to in subparagraph (b) should not be restricted to those from States Parties but that the Enterprise would also be able to receive funds from multinational corporations. Another delegation felt that voluntary contributions could also come from appropriate non-governmental organizations.

Article 27

Borrowing power of the Enterprise

1. The Enterprise shall have the power to borrow funds and to furnish such collateral or other security as it may determine. Before making a public sale of its obligations in the financial markets or currency of a State Party, the Enterprise shall obtain the approval of that State Party. The total amount of borrowings shall be approved by the Council upon the recommendation of the Governing Board.

2. States Parties shall make every reasonable effort to support applications by the Enterprise for loans on capital markets and from international financial institutions. 61/

60/ Annex IV, article 11 (1) (e).

61/ Annex IV, article 11 (2).

/...

Article 28

Financing of the first mine site and initial administrative expenses

1. The Enterprise shall be provided with the funds necessary to explore and exploit one mine site and to transport, process and market the minerals recovered therefrom and the nickel, copper, cobalt and manganese obtained, and to meet its initial administrative expenses. 62/

2. All States Parties shall make available to the Enterprise an amount equivalent to one half of the funds referred to in paragraph 1 by the way of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget in force at the time when the assessments were made, adjusted to take into account the States which are not members of the United Nations. Debt incurred by the Enterprise in raising the other half of the funds shall be guaranteed by all States Parties in accordance with the same scale.

3. If the sum of the financial contributions of States Parties is less than the funds to be provided to the Enterprise under paragraph 1, the Assembly shall, at its first session, consider the extent of the shortfall and adopt by consensus measures for dealing with this shortfall, taking into account the obligations of States Parties under paragraphs 1 and 2, and any recommendations of the Preparatory Commission.

4. (a) Each State Party shall, within 60 days after the entry into force of the Convention, or within 30 days after the deposit of its instruments of ratification or accession, whichever is later, deposit with the Enterprise irrevocable, non-negotiable, non-interest-bearing promissory notes in the amount of the share of such State Party of interest-free loans pursuant to paragraph 2.

(b) The Governing Board shall prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for the activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention.

(c) The States Parties shall thereupon be notified by the Enterprise, through the Authority, of their respective shares in accordance with paragraph 2, required for such expenses. The Enterprise shall encash such amounts of the promissory notes as may be required to meet the expenditure referred to in the schedule with respect to interest-free loans.

62/ The Preparatory Commission should note that the amount of the said funds, and the criteria and factors for its adjustment, shall be included in the draft rules, regulations and procedures of the Authority.

(d) States Parties shall, upon receipt of the notification, make available their respective shares of debt guarantees for the Enterprise in accordance with paragraph 2.

5. (a) If the Enterprise so requests, States Parties may provide debt guarantees in addition to those provided in accordance with the scale referred to in paragraph 2.

(b) In lieu of debt guarantees, a State Party may make a voluntary contribution to the Enterprise in an amount equivalent to that portion of the debts which it would otherwise be liable to guarantee.

6. Repayment of the interest-bearing loans shall have priority over the repayment of the interest-free loans. Repayment of interest-free loans shall be in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council and the advice of the Governing Board. In the exercise of this function the Board shall be guided by the relevant provisions of the rules, regulations and procedures of the Authority, which shall take into account the paramount importance of ensuring the effective functioning of the Enterprise and, in particular, ensuring its financial independence. 63/

7. Funds made available to the Enterprise shall be in freely usable currencies or currencies which are freely available and effectively usable in the major foreign exchange markets. Except as provided in article 27, no State Party shall maintain or impose restrictions on the holding, use or exchange by the Enterprise of these funds. 64/

Annotation

(1) With respect to paragraph 1, it was pointed out that, in view of the considerable uncertainties surrounding seabed mining, including the size and financial requirements for the initial mine site, it would be difficult to predict with any accuracy the amount of funds that would be required.

(2) It was generally felt that Governments should not be required to make their investments until the operational plan had been drawn up. However, since the Enterprise would need funds to cover its initial administrative expenses, this component of the funds should be budgeted separately. The rest of the funds would be subject to a call-up by the Enterprise when a decision was close with respect to the start-up of the project. Some delegations stated that while the initial administrative expenses of the

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63/ Annex IV, article 11 (3).

64/ Annex IV, article 11 (3) (g). It should be noted that these currencies will have to defined in the rules, regulations and procedures of the Authority in accordance with prevailing international monetary practice.

/...

Enterprise should be as low as possible this should not hinder it from functioning at an optimal level. Another delegation felt that the hands of the Governing Board should not be tied.

(3) It was further noted that default by a State Party with respect to its contributions to the fund for the first mine site of the Enterprise was a matter quite separate from a default with respect to the Authority's budget and deserved close attention, since the Enterprise would be wholly dependent on these contributions.

Article 29

Funds, assets and expenses

The funds, assets and expenses of the Enterprise shall be kept separate from those of the Authority. This provision shall not prevent the Enterprise from making arrangements with the Authority regarding facilities, personnel and services and arrangements for reimbursement of administrative expenses paid by either on behalf of the other. 65/

Article 30

Annual audit

The records, books and accounts of the Enterprise, including its annual financial statements, shall be audited annually by an independent auditor appointed by the Council. 66/

Section 11. SETTLEMENT OF DISPUTES

Article 31

Jurisdiction

The Seabed Disputes Chamber shall have jurisdiction in disputes with respect to activities in the Area between parties to a contract, being States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, concerning:

(a) the interpretation or application of a relevant contract or a plan of work, or

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65/ Annex IV, article 11 (4).

66/ Annex IV, article 11 (5).

(b) acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. 67/

Article 32

Interpretation or application of a contract

1. Disputes concerning the interpretation or application of a contract referred to in article 31, subparagraph (a), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, of the Convention, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.

2. If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or *proprio motu*, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.

3. In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree. 68/

Section 12. LIABILITY

Article 33

Liability

The Enterprise shall not be liable for the acts or obligations of the Authority, nor shall the Authority be liable for the acts or obligations of the Enterprise. 69/

67/ Article 187 (c).

68/ Article 188 (2).

69/ Annex IV, article 2.

Annotation

It was emphasized by one delegation that the Enterprise and the Authority were independent legal entities with different responsibility and liability.

Article 34

Limitation of liability of the members of the Authority

Without prejudice to Annex IV, article 11, paragraph 3, of the Convention, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise. 70/

Section 13. PRIVILEGES AND IMMUNITIES

Article 35

Position of Enterprise with regard to judicial process

Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territory of a State Party in which the Enterprise:

(a) has an office or facility;

(b) has appointed an agent for the purpose of accepting service or notice of process;

(c) has entered into a contract for goods or services;

(d) has issued securities; or

(e) is otherwise engaged in commercial activity. 71/

Article 36

Immunity of the property and assets

1. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or

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70/ Annex IV, article 3.

71/ Annex IV, article 13 (3) (a).

execution before the delivery of final judgement against the Enterprise. 72/

2. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of seizure by executive or legislative action. 73/

Article 37

Exemption from restrictions, regulations, controls and moratoria

The property and assets of the Enterprise, wherever located and by whomsoever held, shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature. 74/

Article 38

Respect for local laws and regulations

The Enterprise and its employees shall respect local laws and regulations in any State or territory in which the Enterprise or its employees may do business or otherwise act. 75/

Article 39

Rights, privileges and immunities

States Parties shall ensure that the Enterprise enjoys all rights, privileges and immunities accorded by them to entities conducting commercial activities in their territories. These rights, privileges and immunities shall be accorded to the Enterprise on no less favourable a basis than that on which they are accorded to entities engaged in similar commercial activities. If special privileges are provided by States Parties for developing States or their commercial entities, the Enterprise shall enjoy those privileges on a similarly preferential basis. 76/

72/ Annex IV, article 13 (3) (b).

73/ Annex IV, article 13 (4) (a).

74/ Annex IV, article 13 (4) (b).

75/ Annex IV, article 13 (4) (c).

76/ Annex IV, article 13 (4) (d).

Annotation

It was pointed out that rights, privileges and immunities were being discussed in informal plenary and that Special Commission 2 should wait on its decision on the Headquarters Agreement and see whether they fit the structure and organization of the Enterprise. It was pointed out that separate agreements were needed between the Enterprise and those State Parties within whose territory the Enterprise established sub-offices. It was noted that the Enterprise was a commercial entity and should be treated like other commercial entities under the most-favoured-nation clause. It was agreed that the question of whether the privileges and immunities of the Enterprise should be separated from those of the Authority would depend on what the host country decided.

Article 40

Special incentives, rights, privileges and immunities

States Parties may provide special incentives, rights, privileges and immunities to the Enterprise without the obligation to provide such incentives, rights, privileges and immunities to other commercial entities. 77/

Article 41

Tax status

The Enterprise shall negotiate with the host countries in which its offices and facilities are located for exemption from direct and indirect taxation. 78/

Article 42

Waiver

The Enterprise may waive any of the privileges and immunities conferred upon it under this section or in special agreements concluded by the Enterprise, to such extent and upon such conditions as it may determine. 79/

77/ Annex IV, article 13 (4) (e).

78/ Annex IV, article 13 (5).

79/ Based upon Annex IV, article 13 (7).

Section 14. PROCUREMENT

Article 43

Procurement

1. If the Enterprise does not possess the goods and services required for its operations it may procure them. For that purpose, it shall issue invitations to tender and award contracts to bidders offering the best combination of quality, price and delivery time.

2. If there is more than one bid offering such a combination, the contract shall be awarded in accordance with:

(a) the principle of non-discrimination on the basis of political or other considerations not relevant to the carrying out of operations with due diligence and efficiency; and

(b) guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and geographically disadvantaged among them.

3. The Governing Board may adopt rules determining the special circumstances in which the requirement of invitations to bid may, in the best interests of the Enterprise, be dispensed with. 80/

80/ Annex IV, article 12 (3).

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THE ORGANIZATIONAL STRUCTURE OF THE ENTERPRISE

ANNOTATIONS MADE IN SPECIAL COMMISSION 2 ON THE PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE

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INTRODUCTION

1. The present paper contains annotations made in Special Commission 2 on the structure and organization of the Enterprise. It incorporates working paper 16 (LOS/PCN/SCN.2/WP.16), entitled "Provisions of the Convention relating to the structure and organization of the Enterprise", and the annotations which were made thereto, and also recommends supplementary draft provisions to that working paper.

2. The Special Commission commenced its discussions on the structure and organization of the Enterprise on the basis of working paper 16 at the seventh session in Kingston (27 February-23 March 1989). Working paper 16 proved to be useful because it is a compendium of all the relevant provisions of the Convention relating to the Enterprise, which are dispersed throughout Part XI and its annexes. It served to identify those provisions of the Convention to which annotations were required to assist the Authority, and subsequently the Enterprise, in making their initial decisions. The working paper also served to identify those elements that would form the substance of recommendations to the Authority on transitional arrangements during the pre-operational stage of the Enterprise. These questions are dealt with in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1.

3. The Special Commission in its meetings on the question of annotations felt that, while it could not amend the Convention, it could furnish liberal interpretations of its provisions by way of annotations as long as their basic purpose and intent were not disturbed. It was understood that these annotations would serve several purposes: (1) to allow the Preparatory Commission to comment on provisions of the Convention in the interest of promoting reasonable interpretations; (2) to suggest supplementary draft provisions, if necessary, to facilitate its effective application; and (3) to suggest additional draft rules on matters such as confidentiality, on which the Convention has no rule specific to the Enterprise.

4. In general, the Special Commission addressed the need to preserve maximum autonomy for the fully fledged Enterprise and flexibility in its operations, in keeping with its basic commercial character and the need to ensure efficient management and a streamlined structure.

5. There was agreement that in the relationship between the Governing Board and the Council/Assembly, it will be important to avoid placing unnecessary constraints on the Enterprise. Here, it was also emphasized that the directives given to the Enterprise should be limited to those of a political character, while commercial considerations would be the exclusive concern of the Governing Board of the Enterprise. The Enterprise, it was stressed, would need to be businesslike in its dealings and be protected against pressures from the Authority. In order to avoid interference in the day-to-day operations of the Enterprise by the Governing Board, it was pointed out that the Director-General required independence. It was also noted that it would be important for the mining code to avoid introducing constraints on the Enterprise, e.g., with respect to its procedures for the acquisition of technology.

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6. The Special Commission completed its discussions of working paper 16 at the ninth session in Kingston (25 February-22 March 1991) and requested the Secretariat to issue a new paper which would not only incorporate the provisions of the Convention relating to the structure and organization of the Enterprise as contained in working paper 16, but would also contain the annotations which were made to that working paper. That paper was issued as document LOS/PCN/SCN.2/L.8 at the summer session in New York (12-30 August 1991) but did not become the subject of discussion until the tenth session in Kingston (24 February-13 March 1992). Following an article-by-article reading of document L.8, the Special Commission decided that some additional annotations to working paper 16 would need to be included and that document L.8 should therefore be revised.

7. In its statement the Group of Six pointed out that, contrary to the expectations held during the Third United Nations Conference on the Law of the Sea, the prospects for the commercial production of minerals from the deep seabed had receded into the next century. Therefore, there would be no deep seabed mining immediately after the entry into force of the Convention. There would instead be a longer period of yet undetermined length between the entry into force of the Convention and the time when deep seabed mining became economically viable. Furthermore, approaches to economic issues at national and international levels had undergone a considerable transformation in favour of market economy principles. Consequently there was a growing acceptance that the Enterprise should operate on purely commercial terms and that its first mining operation should be carried out as a joint venture together with other deep seabed mining companies. All these developments underscored that the provisions of the Convention relating to the Enterprise had been overtaken by events and therefore needed to be changed. Other developments affecting these provisions would occur probably during the interim period, i.e., between the entry into force of the Convention and the time that deep seabed mining became economically viable. It was, in the opinion of the Group of Six, premature to take any decision now regarding the detailed structure and organization of the Enterprise. That would of course be regulated when deep seabed mining became effectively possible and when one had a clear picture of the conditions under which deep seabed mining would be carried out. Consequently, the Group thought that it was inappropriate at the moment to annotate provisions of which one did not know whether and under which circumstances they would be applied.

8. On the basis of the discussions on the various articles in working paper 16, Special Commission 2 found that annotations were called for with respect to a number of articles. Changes which were made to the articles themselves are underscored in the text that follows.

PROVISIONS OF THE CONVENTION RELATING TO THE STRUCTURE AND ORGANIZATION OF THE ENTERPRISE AND RECOMMENDED ANNOTATIONS THEREON

Article 1

Use of terms

For the purposes of these articles:

/...

(1) "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;

(2) "Authority" means the International Seabed Authority;

(3) "activities in the area" means all activities of exploration for, and exploitation of, the resources of the Area;

(4) "Convention" means the United Nations Convention on the Law of the Sea;

(5) "Secretary-General" means the Secretary-General of the Authority;

(6) "debt guarantee" means a promise of a State Party to creditors of the Enterprise to pay, pro rata in accordance with the appropriate scale, the financial obligations of the Enterprise covered by the guarantee following notice by the creditors to the State Party of a default by the Enterprise. Procedures for the payment of those obligations shall be in conformity with the rules, regulations and procedures of the Authority; 1/

(7) "States Parties" has the same meaning as in article 1, paragraph 2, of the Convention;

(8) "Director-General" means the Director-General of the Enterprise.

(9) "Governing Board" means the Governing Board of the Enterprise.

Annotation

(1) The Special Commission agreed that the definition of "Governing Board" should be included in the article. Working paper 16 was thus amended to include a new paragraph 9. The Special Commission decided not to include a definition of the term "nucleus Enterprise", since the definition and functions of the nucleus Enterprise are contained in document LOS/PCN/SCN.2/1992/CRP.5/Rev.1.

(2) In paragraph 6 the more general question of how the Enterprise is to be financed was raised in the event that the major contributors (based on the United Nations scale of assessments) do not join. It was noted that the following questions would need to be addressed: whether payment by a State Party of the debt would be treated as a loan to the Enterprise, and if so, whether it was an interest-bearing loan or not; and whether a debt was convertible or not.

1/ Annex IV, art. 11 (3) (h).

Section 1. ESTABLISHMENT OF THE ENTERPRISE

Article 2

Establishment

There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in article 170, paragraph 1, of the Convention. 2/

Section 2. PURPOSES OF THE ENTERPRISE

Article 3

Purposes of the Enterprise

1. The Enterprise shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2 (a), of the Convention, as well as the transporting, processing and marketing of minerals recovered from the Area. 3/

2. In carrying out its purposes and its functions, the Enterprise shall not interfere in the political affairs of any State Party, nor shall it be influenced in its decisions by the political character of the State Party concerned. 4/

3. Only commercial considerations shall be relevant to its decisions and these considerations shall be weighed impartially in order to carry out the purposes specified in annex IV, article 1, of the Convention. 5/

Annotation

(1) This article was described as one which lent itself to flexible interpretation. It was pointed out that paragraph 1 required modification in order to make it more reasonable in the face of current realities and to ensure compatibility with paragraph 3. It was suggested that the Enterprise would initially do less than what was laid down in the Convention, possibly only monitoring, training, pre-feasibility studies, including studies of operational options. Functions could be assigned to the nucleus Enterprise to be carried out in various stages. It was decided that those questions were best dealt with under a transitional arrangement.

2/ Art. 158 (2).

3/ Art. 170 (1).

4/ Annex IV, art. 12 (7).

5/ Annex IV, art. 12 (7).

(2) Discussions on paragraph 3 centred on whether the Enterprise should take its decisions only on the basis of "commercial considerations". While some agreed with this, others suggested that profit earning should not be its sole motive, because the Enterprise was there for the common good and it should be a leader in deep seabed mining. It was further suggested that, as a result of the need to preserve the marine environment, the Enterprise should in its decisions take into account any relevant regulatory requirements. While the need to protect and preserve the marine environment enjoyed the full support of the Special Commission, it was pointed out that paragraph 3 was not the place in which to reflect this concern since that paragraph contained the principle on the basis of which the Enterprise was to operate. The need to protect and preserve the marine environment, it was therefore suggested, should be reflected in the provisions regarding the implementation of the functions of the Enterprise.

(3) Some questioned the subdivision of paragraphs 2 and 3 since care had been taken at the time of the Conference not to do so, while others considered it to be a good idea to separate the commercial aspects from the political ones. There was general agreement that decisions relating to political matters should only be made by the Council or the Assembly.

(4) It was thought that the area of commercial considerations should be left broad. It would be unrealistic to expect the Enterprise to operate only on sound commercial principles in its initial stage, when it would be more concerned with monitoring and research operations. In this connection, it was observed that the meaning of sound commercial principles today included pre-operational work on research and development. This observation was followed by a general discussion on whether the Enterprise should in its initial phase engage in research and development of technology, or whether it should acquire it through transfer of technology. Questions of costs were raised if the Enterprise were to set up its own research and development unit. Some suggested that the Enterprise should concentrate its initial efforts on monitoring the activities of the registered pioneer investors and others engaged in seabed mining. It was recognized that initially the Enterprise would need only a small research and development unit, maybe one or two Professional staff, leaving room for expansion later.

(5) It was agreed that the reference in paragraph 3 should not be to paragraph 1 but to Annex IV, article 1, of the Convention because it would otherwise result in an inconsistency with the Convention's direction on the matter.

Section 3. LEGAL PERSONALITY

Article 4

Legal personality

1. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is necessary for the

exercise of its functions and the fulfilment of its purposes as is provided for in the Statute set forth in Annex IV and, in particular, the capacity: 6/

(a) To enter into contracts, joint arrangements or other arrangements, including agreements with States and international organizations;

(b) To acquire, lease, hold and dispose of immovable and movable property;

(c) To be a party to legal proceedings; 7/

(d) To loan money, issue guarantees and use its credit;

(e) To acquire, hold, use and dispose of shares or other interests in, or obligations of, corporations, associations, partnerships, trusts or other enterprises, or any obligations of a Government;

(f) To pay pension and establish pension plans, profit sharing and other incentive plans for its staff;

(g) To indemnify the members of the Governing Board, the Director-General, officials and staff; and

(h) To exercise such powers incidental to its business as shall be necessary. 8/

2. The Enterprise shall act in accordance with the Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council. 9/

3. Subject to paragraph 2, The Enterprise shall enjoy autonomy in the conduct of its operations. 10/

Annotation

(1) The opinion was expressed that the functions outlined in paragraph 1 (d) and (e) should not be under the purview of the Enterprise, but should be left to the Council or Assembly. Given current realities, it was pointed out that there was no reason for the Enterprise to undertake these functions since they would not be required in the foreseeable future at any rate. It was proposed that the Enterprise should give the proceeds from its operations to those that needed it and not reinvest it; reinvestments, it was suggested, might result in benefits

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6/ Article 170 (2); Annex IV, art. 13 (2).

7/ Annex IV, art. 13.

8/ Annex IV, art. 12 (6).

9/ Art. 170 (2).

10/ Annex IV, art. 2 (2).

/...

being denied to a larger community. On the other hand it was stated that most businesses needed the freedom to carry out the functions contained in paragraph 1 (d) and (e) and that they constituted general practice. It was pointed out that the Enterprise should not be strait-jacketed by provisions which prevented it from playing the market and maximizing its profits. Functions like these would also ensure the Enterprise's autonomy.

(2) Clarification was sought as to what was meant by "or any obligations of a Government" in paragraph 1 (e). It was noted that the guiding part of subparagraph (e) was its first line, i.e., "to acquire, hold, use and dispose of shares or other interests in," the implication being that the Enterprise can also deal with Governments. In that connection it was noted that this should not be a function of the Governing Board. The suggestion was made that a term other than "obligations" might be more suitable.

(3) One delegation believed that the functions contained in paragraph 1 (d) to (h) should be deleted because they were details of a contract and were subject to contractual arrangements which were provided for in paragraph 1 (a).

Section 4. PLACE OF BUSINESS

Article 5

Place of business

1. The Enterprise shall have its principal office at the seat of the Authority. 11/

2. The Governing Board may establish in the territory of any State Party with the consent of that State Party other offices and facilities as it deems necessary for the exercise of the functions of the Enterprise. 12/

Section 5. STRUCTURE OF THE ENTERPRISE

Article 6

Structure

The Enterprise shall have a Governing Board, a Director-General and the staff necessary for the exercise of its functions. 13/

11/ Annex IV, art. 8.

12/ Annex IV, art. 8.

13/ Annex IV, art. 4.

Annotation

Attention was given to the relationship between the Director-General and his staff, with emphasis on the need for the Director-General to have full control over day-to-day operations. It was agreed that the power to appoint and dismiss staff must be at his discretion.

Section 6. THE GOVERNING BOARD

Article 7

Convening of first meeting

The first meeting of the Governing Board shall be convened by the Secretary-General within [...] following the date on which the Convention enters into force.

Article 8

Frequency of meetings

The Governing Board shall meet as often as the business of the Enterprise may require. 14/

Article 9

Place of meeting

The Governing Board shall normally function at the principal office of the Enterprise. 15/

Article 10

Membership

1. The Governing Board shall be composed of 15 members elected in accordance with article 24, subparagraph (b). 16/

2. Members of the Board shall act in their personal capacity. In the performance of their duties they shall not seek or receive instructions from any Government or from any other source. 17/

14/ Annex IV, art. 5 (6).

15/ Annex IV, art. 5 (6).

16/ Annex IV, art. 5 (1).

17/ Annex IV, art. 5 (4).

/...

Annotation

(1) It was pointed out that a time-frame would need to be set for the first election of the members of the Governing Board. In this connection, it was noted that it will be up to the Authority to decide when that election should take place.

(2) One delegation was of the view that, in conformity with article 5, paragraph 1 of annex IV, paragraph 1 of article 10 should be followed by the provision contained in article 11.

Article 11

Equitable geographical distribution and the representation of special interests

In the election of members of the Governing Board, due account shall be taken of the need for equitable geographical distribution and the representation of special interests. 18/

Annotation

The reference to "special interests" in the article was a source of difficulty. Some favoured the deletion of this reference while reserving their position on the question of the representation of land-locked and geographically disadvantaged States. It was noted that while the Secretariat had made a reasonable analogy to the election of other bodies of the Authority, namely the Commissions, the reference to "special interests" should, none the less, be deleted in the absence of a direct guideline in the Convention. It was noted that article 5 (1) of annex IV only referred to the principle of equitable geographical distribution. Furthermore, it was argued that since the members of the Governing Board should act in their personal capacity there was no need for the criteria of special interests. It was therefore proposed that the reference in footnote 18 be changed to article 5 (1) of annex IV instead of article 163 (4). Some delegations felt that there should be a definition of "special interests". Attention was drawn to the second sentence of article 161, paragraph 1 (d), of the Convention on the composition, procedure and voting of the Council which provides as follows: "The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals, and least developed States". Others opposed the deletion of the reference to "special interests" and a consequent change in footnote 18. Another member considered it important to retain the reference in view of the position of land-locked and geographically disadvantaged States.

18/ Based upon art. 163 (4).

Article 12

Nominations

In submitting nominations of candidates for election to the Governing Board, members of the Authority shall bear in mind the need to nominate candidates of the highest standard of competence, with qualifications in relevant fields, so as to ensure the viability and success of the Enterprise. 19/

Annotation

It was pointed out that the reference to "relevant fields" would require elaboration. In this connection it was observed that candidates should have technical and relevant practical experience. It was suggested that this should be made explicit in the article. It was noted that guidance as to some of the types of expertise required may be inferred from the table in document LOS/PCN/BUR/R.6, i.e., the report of the Group of Technical Experts to the General Committee, in which are outlined the priority disciplines which training should address. It was emphasized that a combination of expertise be represented on the Governing Board, for example, financial, accounting and administrative and project management.

Article 13

Term of office

1. Members of the Governing Board shall be elected for four years and may be re-elected; and due regard shall be paid to the principle of rotation of membership. 20/

2. Members of the Governing Board shall continue in office until their successors are elected. 21/

3. If the office of a member of the Board becomes vacant, the Assembly shall, in accordance with article 24, subparagraph (b), elect a new member for the remainder of his predecessor's term. 22/

Annotation

(1) With respect to paragraph 1, it was proposed that an arrangement should be found to rotate the membership of the Governing Board in such a way as to ensure

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19/ Annex IV, art. 5 (1).

20/ Annex IV, art. 5 (2).

21/ Annex IV, art. 5 (3).

22/ Annex IV, art. 5 (3).

continuity, e.g. by re-electing one third of the members for a second term and rotating two thirds. It was noted that this was the practice of most institutions. One delegation believed that the members of the Governing Board should only be re-elected once so as to ensure a rotation of the membership.

(2) Following the discussions on articles 16, 17 and 18, and specifically the need to deal with the problem of repeated absenteeism without good reason, it was suggested that an annotation could be made under paragraph 3 to the effect that a member who was absent without good cause for three, four or five statutory meetings of the Board would be disqualified.

Article 14

Remuneration

Each member of the Governing Board shall receive remuneration to be paid out of the funds of the Enterprise. The amount of remuneration shall be fixed by the Assembly, upon the recommendation of the Council. 23/

Article 15

Powers and functions of the Governing Board

1. The Governing Board shall direct the operations of the Enterprise. Subject to the Convention, the Board shall exercise the powers necessary to fulfil the purposes of the Enterprise, including powers: 24/

(a) To elect a Chairman from among its members;

(b) To adopt its rules of procedure;

(c) To draw up and submit formal written plans of work to the Council in accordance with article 153, paragraph 3, and article 162, paragraph 2 (j), of the Convention;

(d) To develop plans of work and programmes for carrying out the activities specified in article 170 of the Convention;

(e) To prepare and submit to the Council applications for production authorizations in accordance with article 151, paragraphs 2 to 7, of the Convention;

(f) To authorize negotiations concerning the acquisition of technology, including those provided for in Annex III, article 5, paragraph 3 (a), (c) and (d), of the Convention, and to approve the results of those negotiations;

23/ Annex IV, art. 5 (5).

24/ Annex IV, art. 6.

(g) To establish terms and conditions, and to authorize negotiations, concerning joint ventures and other forms of joint arrangements referred to in Annex III, articles 9 and 11, of the Convention, and to approve the results of such negotiations;

(h) To recommend to the Assembly what portion of the net income of the Enterprise should be retained as its reserves in accordance with article 160, paragraph 2 (f), and Annex IV, article 10, of the Convention;

(i) To approve the annual budget of the Enterprise;

(j) To authorize the procurement of goods and services in accordance with Annex IV, article 12, paragraph 3, of the Convention;

(k) To submit an annual report to the Council in accordance with Annex IV, article 9, of the Convention;

(l) To submit to the Council for the approval of the Assembly draft rules in respect of the organization, management, appointment and dismissal of the staff of the Enterprise and to adopt regulations to give effect to such rules;

(m) To borrow funds and to furnish such collateral or other security as it may determine in accordance with Annex IV, article 11, paragraph 2, of the Convention;

(n) To enter into any legal proceedings, agreements and transactions and to take any other actions in accordance with Annex IV, article 13, of the Convention;

(o) To delegate, subject to the approval of the Council, any non-discretionary powers to the Director-General and to its committees;

(p) To nominate the Director-General for recommendation by the Council and election by the Assembly; 25/

(q) To recommend to the Council the ceiling on the Enterprise's borrowings; 26/

(r) To prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention; 27/

25/ Annex IV, art. 7 (1).

26/ Annex IV, art. 11 (2) (a).

27/ Annex IV, art. 11 (3) (d) (ii).

/...

(s) To prepare a funding schedule for the repayment of the interest-free loans to the Enterprise from States Parties to be adopted by the Assembly on the recommendation of the Council. 28/

2. In addition, the Governing Board shall:

(a) Establish procurement rules, regulations and procedures in accordance with article 43; 29/

(b) Establish reporting requirements and procedures pursuant to Annex IV, article 9, of the Convention;

(c) Set out procedures for funding pursuant to Annex IV, article 11, of the Convention;

(d) Provide procedures for the approval of the annual budget pursuant to article 15, paragraph 1 (i);

(e) Establish accounting and internal audit procedures.

Annotation

(1) The general question was raised as to whether there was any point in electing the Governing Board upon the establishment of the Enterprise if the current economic conditions persisted, since it would end up being a burden on the budget of the Authority. The opinion was expressed that it was necessary to elect a Governing Board upon the establishment of the Enterprise, in order for it to determine policy decisions which the Enterprise would implement, but that the frequency of the Board's meetings in the initial stages could be significantly reduced.

(2) It was noted that article 15, listing 20 functions of the Governing Board, was difficult to relate to the need for flexible management and a dynamic Director-General.

(3) With respect to paragraph 1 (b), the question was raised as to whether it was up to Special Commission 2 to prepare rules of procedure for the Governing Board. It was pointed out that the Board has been given the authority to determine its own rules of procedure and that Special Commission 2 was not to make binding rules for the Board but only recommendations in its annotations. It was suggested that the Governing Board should include in its rules of procedure some rules regarding the length of the term of office of the Chairman, the question of rotation of the Chairman and the members of the Governing Board as well as the question of equitable geographical distribution on the Board.

(4) Following the discussions on articles 16, 17 and 18, it was suggested that the Governing Board should in its rules of procedure take into account the possibility of consultations on non-substantive matters being undertaken by the

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28/ Annex IV, art. 11 (3) (f).

29/ Annex IV, art. 12 (3).

Chairman and some of the members of the Board outside of the framework of a meeting of the Board. This procedure would, for example, apply to budgetary matters which did not involve any additional expenses. The Chairman could communicate with the members by mail and obtain their views on such matters.

(5) Since the Convention was silent on the subject of vice-chairmen, it was also pointed out that it was usual practice to provide for one or two vice-chairmen in the event that the Chairman was unable to attend meetings of the Board.

(6) There was extensive discussion on paragraph 2 (e) and the question of whether the Governing Board should establish its own internal audit and accounting procedures or whether this should be left to the Authority. While it was considered necessary to allow the Board the freedom to decide on the internal audit procedures which should be followed since the internal audit was essentially there for the benefit of the Director-General - it is his internal check system or early watchdog unit - no agreement could be reached on the question of whether the Governing Board should establish its own accounting procedures.

(7) While it was agreed that it was the Council which would draw up accounting rules, it was pointed out that there was no provision in the Convention which specifically authorized the Council to establish accounting procedures. The view was expressed that approval should be given by the Council for the Governing Board to establish accounting procedures for the Enterprise and that this should be listed as a function of the Council under article 25. Since the Enterprise would also be engaged in commercial operations, it was suggested that its accounting rules and procedures should closely follow those developed for contractors. It was pointed out that the decision on accounting procedures for the Enterprise should await the results of the ongoing discussions on the subject in relation to the contractor in Special Commission 3, since at its conclusion a set of accounting rules and procedures was to be appended to the contract. It was further noted that if Special Commission 3 accepted the accounting principles and procedures contained in document LOS/PCN/SCN.3/WP.6/Add.7 they would be part of the generally recognized accounting principles in accordance with which the Enterprise was to establish its accounting procedures. Another view was that the Enterprise had the autonomy to establish its own accounting procedures without obtaining approval from the Council. Reference was also made to article 30 where provision was made for an annual audit by an independent auditor appointed by the Council. A proposal was made to subdivide subparagraph (e) into new subparagraphs (e) and (f) as follows:

> "(e) establish accounting procedures in accordance with generally recognized accounting principles;
>
> "(f) establish internal audit procedures."

(8) It was pointed out that most companies' accounting procedures were based on accounting principles in use and that the accounting procedures conformed to a general format. The phrase "in accordance with generally recognized accounting principles" is a standard phrase which applies to a large number of countries in the world and has a standing in the professional community of accountants.

/...

Article 16

Quorum for meetings

Two thirds of the members of the Governing Board shall constitute a quorum. 30/

Article 17

Voting rights

Each member of the Governing Board shall have one vote. 31/

Article 18

Decision-making

1. All matters before the Governing Board shall be decided by a majority of its members. If a member has a conflict of interest on a matter before the Board he shall refrain from voting on that matter. 32/

2. Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement.

3. [Deleted]

Annotation to articles 16, 17 and 18

(1) There was extensive discussion on the possibility of delaying decisions if only two thirds of the members of the Governing Board were able to attend a meeting of the Board and a decision had to be taken by a majority. Two suggestions were made to deal with the problem: first, that proxy voting should be permitted; and second, that the Governing Board could provide in its rules of procedure that where a decision had to be taken by a quorum the decision of a member who could not be present had to be confirmed by a postal ballot. It was observed that proxy voting was only possible if there was a quorum. In this connection it was pointed out that it was the responsibility of the Chairman to ensure that the members of the Board were able to attend a meeting. It was recognized that once a quorum was established and a decision needed to be taken by a majority, proxy voting should be permitted where it was not possible to obtain a majority. Advanced information on matters which would be discussed at the meeting would have to be sent to the members of the Governing Board so that the members voting by proxy would have all the necessary information. The

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30/ Annex IV, art. 5 (7).

31/ Annex IV, art. 5 (8).

32/ Annex IV, art. 5 (8).

Special Commission understood the term "majority" in paragraph 1 of article 18 to mean a majority of the members of the Governing Board.

(2) It was stressed that the problem of repeated absenteeism of members of the Governing Board, without good reason, would require some disciplinary measures. It was suggested that an annotation could be made to this effect under article 13 (3).

(3) With respect to the issue of conflict of interest in the second sentence of paragraph 1 of article 18, it was recognized that where a member had or acquired in the future an interest in the matter being voted on, a legal obligation to refrain from voting, rather than a provision which appealed to his morality, was called for. It was suggested that the Governing Board should in cases of doubt determine by a majority whether or not there was in fact a conflict of interest.

(4) It was observed that since paragraph 2 of article 18 did not derive from the Convention, the provision should be hortatory and not obligatory in respect of arriving at decisions on the basis of consensus or general agreement. It was decided to delete paragraph (3) which contained the definition of "consensus". The Special Commission agreed to reword paragraph 2 as follows: "Without prejudice to the provisions in paragraph 1 of this article, in so far as possible, the Governing Board should make every effort to reach its decisions on substantive matters on the basis of general agreement."

Section 7. THE DIRECTOR-GENERAL AND THE STAFF OF THE ENTERPRISE

Article 19

The Director-General

1. The Director-General shall be elected in accordance with article 24, subparagraph (b).

2. The Director-General shall not be a member of the Governing Board.

3. The Director-General shall hold office for a fixed term, not exceeding five years, any may be re-elected for further terms. 33/

Annotation

One delegation held the view that the Director-General should serve no more than two terms.

33/ Annex IV, art. 7 (1).

Article 20

Functions and duties of the Director-General

1. The Director-General shall act as the legal representative and chief executive of the Enterprise and shall be directly responsible to the Governing Board for the conduct of the operations of the Enterprise.

2. The Director-General shall be responsible for the organization, management, appointment and dismissal of the staff of the Enterprise in accordance with the rules and regulations referred to in article 15, paragraph 1 (1).

3. The Director-General shall participate, without the right to vote, in the meetings of the Governing Board and may participate, without the right to vote, in the meetings of the Assembly and the Council when these organs are dealing with matters concerning the Enterprise. 34/

Annotation

One delegation supported the incorporation into this article of the provision contained in article 22 so as to ensure that the Director-General would not seek or receive instructions from any Government or from any other source external to the Enterprise.

Article 21

The staff of the Enterprise

1. The staff of the Enterprise shall be appointed by the Director-General. The terms and conditions on which they shall be appointed, remunerated and dismissed shall be in accordance with the rules and regulations referred to in article 15, paragraph 1 (1). 35/

2. The staff of the Enterprise shall consist of such qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Enterprise. 36/

3. The paramount consideration in the recruitment and employment of the staff and in the determination of their conditions of service shall be the necessity of securing the highest standards of efficiency and of technical competence. Subject to this consideration, due regard shall be paid to the importance of recruiting the staff on an equitable geographical basis. 37/

34/ Annex IV, art. 7 (2).

35/ Based upon art. 167 (3).

36/ Based upon art. 167 (1).

37/ Annex IV, art. 7 (3).

4. The responsibilities set forth in article 168, paragraph 2, of the Convention are equally applicable to the staff of the Enterprise. [38]

Annotation

One delegation supported the incorporation into this article of the provision contained in article 22 so as to ensure that the staff would not seek or receive instructions from any Government or from any other source external to the Enterprise.

Article 22

International character of the Director-General and the staff

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any Government or from any other source external to the Enterprise. They shall refrain from any action which might reflect on their position as international officials of the Enterprise responsible only to the Enterprise. Each State Party undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities. [39]

Section 8. CONFIDENTIALITY

Article 23

Confidentiality

1. The members of the Governing Board and the Director-General and the staff of the Enterprise shall not disclose, even after the termination of their functions as such, any confidential information coming to their knowledge by reason of their duties on or in relation to the Enterprise.

2. The duty of the members of the Governing Board and the Director-General and the staff of the Enterprise not to disclose confidential information constitutes both an obligation in respect of the individual's appointment or employment for the purposes of the Enterprise and a personal responsibility entailing financial liability. In addition to being liable to any financial or other sanction, any person who has disclosed confidential information in breach of his duty in that behalf shall cease to exercise any function in relation to the receipt or custody of confidential information and shall be disqualified from being re-elected or reappointed to exercise any such function. [40]

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[38] Annex IV, art. 7 (5).

[39] Annex IV, art. 7 (4).

[40] LOS/PCN/WP.24, rule 16.

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Annotation

(1) It was agreed that the rule suggested by the Secretariat (based on rule 16 in LOS/PCN/WP.24 of September 1984) would require redrafting and expansion and that it would also need to apply in the transitional period. It was thought that the drafting of a rule on confidentiality should not be left to the Enterprise as it might draft it to suit its own purposes.

(2) There was agreement that the rule should establish the basic principle, applicable to the Enterprise as a whole. It was suggested that this principle could incorporate the wording of article 168 (2) of the Convention. With respect to the mechanism for observance of this principle, it was pointed out that article 14 (3) of Annex III provided a juridical basis for confidentiality.

(3) It was proposed that provision should be made for the signing of a confidentiality clause or agreement at the time of employment. All that was needed was a signature which attested that a person had accepted the confidentiality clause and a provision providing for a penalty in case of breach. Whether there should be an oath or detailed staff rules would need to be worked out. It was pointed out that where there were no provisions for sanctions in municipal law, workers were often required to take an oath, e.g., under the Official Secrets Act.

(4) It was agreed that a differentiation should be made between management and staff. It was pointed out that it would be necessary to separate the responsibility of the management of the Governing Board from that of the Director-General. A uniform principle should, however, be applicable in both cases, but the terms might need to be different. The Director-General, since his was an intermediary position but he was in some respects also a civil servant, would in case of breach be directly responsible, by virtue of his function or title alone. It was considered that the rule with respect to the Director-General, as manager, should be as rigid as that for the staff. It was proposed that a distinction should be made between staff with access to confidential information in the course of their normal duties and those without such access.

(5) It was proposed that in paragraph 1 the term "staff of the Enterprise" needed to be defined so as to make it clear that the provision applied to all staff, whether permanent, short-term, temporary staff or consultants. It was suggested that in the case of independent contractors an agreement could be drawn up with the Enterprise which would exempt the Enterprise from any liability for their acts.

(6) It was proposed that paragraph 2 should state that the Enterprise and its officers and staff were jointly and severally liable for any damages for breach of the obligations set forth in paragraph 1.

(7) It was pointed out that as the requirement of confidentiality was provided for in the Convention in the Authority itself, each of the executive bodies, i.e., the Council and Governing Board, had the responsibility not only not to disclose confidential information but also to provide the mechanism to prevent this from happening.

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(8) The question was raised as to which organ had the competence to establish financial liabilities and their extent. It was pointed out that the Director-General would be responsible for sanctions with respect to the staff. The Governing Board would be responsible for sanctions with respect to the Director-General and the Authority would be responsible with respect to the Governing Board. It was noted that it would be necessary to provide for a graduation of sanctions as breaches took place at different levels and might vary in magnitude.

(9) It was agreed that the obligation not to disclose confidential information should also cover the post-employment period. In this connection it was pointed out by one delegation that the words "as such" in paragraph 1 required clarification.

(10) The question was raised as to the power of the Governing Board to impose sanctions for the post-employment period. It was agreed that these sanctions should differ from those for the employment period and be of a financial or penal nature depending on the extent of the breach caused. However, it was also agreed that a former employee should not be held liable in perpetuity and be made a prisoner of his conscience and thus be stopped from earning a living. An analogy was drawn to the situation in municipal law where contracts in restraint of trade were intended to prevent the exploitation of trade secrets learned by the employee in the course of his employment.

(11) Several problems were highlighted in connection with the implementation of an enforcement mechanism, particularly if a breach occurred after termination of employment, in which case national legislation would then be applicable. It was pointed out that some national systems had no sanctions and that there might be a problem in asking Governments to provide for such sanctions in their national laws. It was also pointed out that there might be a problem with implementing financial liability for breach of personal responsibility in case of bankruptcy. In this connection, it was suggested that the Enterprise could set up a fund akin to that which existed in national systems where insurance institutions provided coverage. While it was thought that there was no problem in setting up a fund for the staff, it was considered difficult to do the same for the members of the Governing Board as it would be hard to assess their collective and individual responsibility. It was pointed out that an insurance policy for staff would not be a real sanction and that it might be preferable to have a fidelity bond - financed through a deduction from the employees' salary - which would be forfeited once a staff member was found guilty of disclosing confidential information. Another option would be to dismiss the person concerned. One delegation expressed support for this last option and thought that the provision in paragraph 2 was not explicit enough to ensure that if a member of the Governing Board, the Director or a member of the staff of the Enterprise violated the confidentiality rule they would be dismissed immediately.

(12) It was agreed that not only the violator but also the beneficiary of a violation should be punished through financial, penal or quasi-disciplinary administrative sanctions. If the recipient of the confidential information was a contractor or subcontractor, the party concerned could be disqualified. If he was an outsider or third company which had found out what the other competitors had bid in order to secure the award of a contract, then appropriate sanctions

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could be disqualification or blacklisting for the future. We would thus be debarred from conducting business with the Enterprise in the future.

Section 9. RELATIONSHIP OF THE ENTERPRISE TO THE ASSEMBLY AND TO THE COUNCIL OF THE AUTHORITY

Article 24

The Assembly

The Assembly shall:

(a) Establish general policies for the Enterprise pursuant to article 170, paragraph 2, and Annex IV, article 2, paragraph 1, of the Convention;

(b) Elect, upon the recommendation of the Council, the members of the Governing Board and the Director-General; 41/

(c) Fix, upon the recommendation of the Council, the remuneration of the members of the Governing Board; 42/

(d) Determine, upon the recommendation of the Governing Board, what portion of the net income of the Enterprise shall be retained as reserves of the Enterprise; 43/

(e) Consider and approve, upon the recommendation of the Governing Board of the Enterprise, the rules, regulations and procedures relating to the transfer of funds from the Enterprise to the Authority; 44/

(f) Adopt, upon the recommendation of the Council and the advice of the Governing Board, the schedule to repay interest-free loans from States Parties to the Enterprise; 45/

(g) Approve draft rules submitted by the Council in respect of the organization, management, appointment and dismissal of staff in accordance with article 15, paragraph 1 (1). 46/

41/ Art. 160 (2) (c).

42/ Annex IV, art. 5 (5).

43/ Annex IV, art. 10 (2).

44/ Art. 160 (2) (f) (ii).

45/ Annex IV, art. 11 (3) (f).

46/ Annex IV, art. 6 (1).

Annotation

It was noted by one delegation that the words "inter alia" should be added after the words "The Assembly shall", since in the future the Assembly may have other functions in relation to the Enterprise.

Article 25

The Council

The Council shall:

(a) Issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention; 47/

(b) Recommend to the Assembly candidates for the election of the members of the Governing Board and the Director-General; 48/

(c) Recommend to the Assembly the remuneration of the members of the Governing Board; 49/

(d) Approve, upon the recommendation of the Governing Board, the ceiling on borrowings of the Enterprise; 50/

(e) Appoint the independent auditor referred to in article 30;

(f) Approve the delegation by the Governing Board of any non-discretionary powers to the Director-General and to its committees; 51/

(g) Approve plans of work submitted by the Governing Board in accordance with Annex IV, article 12, of the Convention, applying, *mutatis mutandis*, the procedures set forth in article 162, paragraph 2 (j), of the Convention; 52/

(h) Approve applications submitted by the Governing Board for production authorizations; 53/

47/ Art. 162 (2) (i).

48/ Art. 162 (2) (c).

49/ Annex IV, art. 5 (5).

50/ Annex IV, art. 11 (2) (a).

51/ Annex IV, art. 6 (o).

52/ Art. 162 (2) (k).

53/ Annex IV, art. 6 (e).

/...

(i) Receive the annual report of the Governing Board; 54/

(j) Consider the reports of the Enterprise and transmit them to the Assembly with its recommendations; 55/

(k) Receive from the Governing Board and submit to the Assembly for approval draft rules in respect of the organization, management, appointment and dismissal of staff; 56/

(l) Consider and take a decision on the annual reports containing an audited statement of accounts and receive at appropriate intervals a summary statement of the financial position of the Enterprise and a profit-and-loss statement showing the results of its operations; 57/

(m) Recommend to the Assembly a schedule for the repayment of interest-free loans to the Enterprise from States Parties on the advice of the Governing Board; 58/

(n) Approve guidelines with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and the geographically disadvantaged among them. 59/

Annotation

(1) It was pointed out that the provision in subparagraph (a) permitted the Council to issue directives with respect to the day-to-day running of the Enterprise - the responsibility of the Director-General - and that it was thus more appropriate to define the powers of the Council in more detail and clarify the subjects on which directives could be issued and how far these should go.

(2) It was agreed that subparagraph (a) should be interpreted in the context of article 4 (3) of the present paper. This would clarify that the directives only refer to those which the Council would be giving to the Governing Board on policy matters. Since article 4 (3) had been taken from article 2 (2) of Annex IV of the Convention, it was agreed to include a reference in subparagraph (a) to article 2 of Annex IV so that the paragraph would now read as follows: "issue directives to the Enterprise in accordance with article 170 and Annex IV, article 2, of the Convention".

54/ Annex IV, art. 6 (k).

55/ Art. 162 (2) (g).

56/ Annex IV, art. 6 (l).

57/ Annex IV, art. 9 (1).

58/ Annex IV, art. 11 (3) (f).

59/ Annex IV, art. 12 (3) (b) (ii).

(3) It was agreed to add the words "and take a decision on" after the word "consider" in the first line of subparagraph (1).

Section 10. FINANCES

Article 26

Sources of funds

The funds of the Enterprise shall include:

(a) Amounts received from the Authority in accordance with article 173, paragraph 2 (b), of the Convention;

(b) Voluntary contributions made by States Parties for the purpose of financing the activities of the Enterprise;

(c) Funds borrowed by the Enterprise;

(d) Income of the Enterprise from its operations;

(e) Other funds made available to the Enterprise to enable it to commence operations as soon as possible and to carry out its functions. 60/

Annotation

One delegation noted that the voluntary contributions referred to in subparagraph (b) should not be restricted to those from States Parties but that the Enterprise would also be able to receive funds from multinational corporations. Another delegation felt that voluntary contributions could also come from appropriate non-governmental organizations.

Article 27

Borrowing power of the Enterprise

1. The Enterprise shall have the power to borrow funds and to furnish such collateral or other security as it may determine. Before making a public sale of its obligations in the financial markets or currency of a State Party, the Enterprise shall obtain the approval of that State Party. The total amount of borrowings shall be approved by the Council upon the recommendation of the Governing Board.

2. States Parties shall make every reasonable effort to support applications by the Enterprise for loans on capital markets and from international financial institutions. 61/

60/ Annex IV, art. 11 (1) (e).

61/ Annex IV, art. 11 (2).

Article 28

Financing of the first mine site and initial administrative expenses

1. The Enterprise shall be provided with the funds necessary to explore and exploit one mine site and to transport, process and market the minerals recovered therefrom and the nickel, copper, cobalt and manganese obtained, and to meet its initial administrative expenses. 62/

2. All States Parties shall make available to the Enterprise an amount equivalent to one half of the funds referred to in paragraph 1 by way of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget in force at the time when the assessments were made, adjusted to take into account the States which are not members of the United Nations. Debt incurred by the Enterprise in raising the other half of the funds shall be guaranteed by all States Parties in accordance with the same scale.

3. If the sum of the financial contributions of States Parties is less than the funds to be provided to the Enterprise under paragraph 1, the Assembly shall, at its first session, consider the extent of the shortfall and adopt by consensus measures for dealing with this shortfall, taking into account the obligations of States Parties under paragraphs 1 and 2, and any recommendations of the Preparatory Commission.

4. (a) Each State Party shall, within 60 days after the entry into force of the Convention, or within 30 days after the deposit of its instrument of ratification or accession, whichever is later, deposit with the Enterprise irrevocable, non-negotiable, non-interest-bearing promissory notes in the amount of the share of such State Party of interest-free loans pursuant to paragraph 2.

(b) The Governing Board shall prepare, at the earliest practicable date after the Convention enters into force, and thereafter at annual or other appropriate intervals, a schedule of the magnitude and timing of its requirements for the funding of its administrative expenses and for the activities carried out by the Enterprise in accordance with article 170 and Annex IV, article 12, of the Convention.

(c) The States Parties shall thereupon be notified by the Enterprise, through the Authority, of their respective shares in accordance with paragraph 2, required for such expenses. The Enterprise shall encash such amounts of the promissory notes as may be required to meet the expenditure referred to in the schedule with respect to interest-free loans.

62/ The Preparatory Commission should note that the amount of the said funds, and the criteria and factors for its adjustment, shall be included in the draft rules, regulations and procedures of the Authority.

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(d) States Parties shall, upon receipt of the notification, make available their respective shares of debt guarantees for the Enterprise in accordance with paragraph 2.

5. (a) If the Enterprise so requests, States Parties may provide debt guarantees in addition to those provided in accordance with the scale referred to in paragraph 2.

(b) In lieu of debt guarantees, a State Party may make a voluntary contribution to the Enterprise in an amount equivalent to that portion of the debts which it would otherwise be liable to guarantee.

6. Repayment of the interest-bearing loans shall have priority over the repayment of the interest-free loans. Repayment of interest-free loans shall be in accordance with a schedule adopted by the Assembly, upon the recommendation of the Council and the advice of the Governing Board. In the exercise of this function the Board shall be guided by the relevant provisions of the rules, regulations and procedures of the Authority, which shall take into account the paramount importance of ensuring the effective functioning of the Enterprise and, in particular, ensuring its financial independence. 63/

7. Funds made available to the Enterprise shall be in freely usable currencies or currencies which are freely available and effectively usable in the major foreign exchange markets. Except as provided in article 27, no State Party shall maintain or impose restrictions on the holding, use or exchange by the Enterprise of these funds. 64/

Annotation

(1) With respect to paragraph 1, it was pointed out that, in view of the considerable uncertainties surrounding seabed mining, including the size and financial requirements for the initial mine site, it would be difficult to predict with any accuracy the amount of funds that would be required.

(2) It was generally felt that Governments should not be required to make their investments until the operational plan had been drawn up. However, since the Enterprise would need funds to cover its initial administrative expenses, this component of the funds should be budgeted separately. The rest of the funds would be subject to a call-up by the Enterprise when a decision was close with respect to the start-up of the project. Some delegations stated that while the initial administrative expenses of the Enterprise should be as low as possible this should not hinder it from functioning at an optimal level. Another delegation felt that the hands of the Governing Board should not be tied.

63/ Annex IV, art. 11 (3).

64/ Annex IV, art. 11 (3) (g). It should be noted that these currencies will have to be defined in the rules, regulations and procedures of the Authority in accordance with prevailing international monetary practice.

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(3) It was further noted that default by a State Party with respect to its contributions to the fund for the first mine site of the Enterprise was a matter quite separate from a default with respect to the Authority's budget and deserved close attention, since the Enterprise would be wholly dependent on these contributions.

Article 29

Funds, assets and expenses

The funds, assets and expenses of the Enterprise shall be kept separate from those of the Authority. This provision shall not prevent the Enterprise from making arrangements with the Authority regarding facilities, personnel and services and arrangements for reimbursement of administrative expenses paid by either on behalf of the other. 65/

Article 30

Annual audit

The records, books and accounts of the Enterprise, including its annual financial statements, shall be audited annually by an independent auditor appointed by the Council. 66/

Section 11. SETTLEMENT OF DISPUTES

Article 31

Jurisdiction

The Seabed Disputes Chamber shall have jurisdiction in disputes with respect to activities in the Area between parties to a contract, being States Parties, the Authority or the Enterprise, State enterprises and natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, concerning:

(a) The interpretation or application of a relevant contract or a plan of work, or

(b) Acts or omissions of a party to the contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. 67/

65/ Annex IV, art. 11 (4).

66/ Annex IV, art. 11 (5).

67/ Art. 187 (c).

Article 32

Interpretation or application of a contract

1. Disputes concerning the interpretation or application of a contract referred to in article 31, subparagraph (a), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree. A commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, of the Convention, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling.

2. If, at the commencement of or in the course of such arbitration, the arbitral tribunal determines, either at the request of any party to the dispute or proprio motu, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer such question to the Seabed Disputes Chamber for such ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.

3. In the absence of a provision in the contract on the arbitration procedure to be applied in the dispute, the arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules or such other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority, unless the parties to the dispute otherwise agree. 68/

Section 12. LIABILITY

Article 33

Liability

The Enterprise shall not be liable for the acts or obligations of the Authority, nor shall the Authority be liable for the acts or obligations of the Enterprise. 69/

Annotation

It was emphasized by one delegation that the Enterprise and the Authority were independent legal entities with different responsibility and liability.

68/ Art. 188 (2).

69/ Annex IV, art. 2.

Article 34

Limitation of liability of the members of the Authority

Without prejudice to Annex IV, article 11, paragraph 3, of the Convention, no member of the Authority shall be liable by reason only of its membership for the acts or obligations of the Enterprise. 70/

Section 13. PRIVILEGES AND IMMUNITIES

Article 35

Position of the Enterprise with regard to judicial process

Actions may be brought against the Enterprise only in a court of competent jurisdiction in the territory of a State Party in which the Enterprise:

(a) Has an office or facility;

(b) Has appointed an agent for the purpose of accepting service or notice of process;

(c) Has entered into a contract for goods or services;

(d) Has issued securities; or

(e) Is otherwise engaged in commercial activity. 71/

Article 36

Immunity of the property and assets

1. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment or execution before the delivery of final judgement against the Enterprise. 72/

2. The property and assets of the Enterprise, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation or any other form of seizure by executive or legislative action. 73/

70/ Annex IV, art. 3.

71/ Annex IV, art. 13 (3) (a).

72/ Annex IV, art. 13 (3) (b).

73/ Annex IV, art. 13 (4) (a).

Article 37

Exemption from restrictions, regulations, controls and moratoria

The property and assets of the Enterprise, wherever located and by whomsoever held, shall be free from discriminatory restrictions, regulations, controls and moratoria of any nature. 74/

Article 38

Respect for local laws and regulations

The Enterprise and its employees shall respect local laws and regulations in any State or territory in which the Enterprise or its employees may do business or otherwise act. 75/

Article 39

Rights, privileges and immunities

States Parties shall ensure that the Enterprise enjoys all rights, privileges and immunities accorded by them to entities conducting commercial activities in their territories. These rights, privileges and immunities shall be accorded to the Enterprise on no less favourable a basis than that on which they are accorded to entities engaged in similar commercial activities. If special privileges are provided by States Parties for developing States or their commercial entities, the Enterprise shall enjoy those privileges on a similarly preferential basis. 76/

Annotation

It was pointed out that rights, privileges and immunities were being discussed in informal plenary and that Special Commission 2 should wait on its decision on the Headquarters Agreement and see whether they fit the structure and organization of the Enterprise. It was pointed out that separate agreements were needed between the Enterprise and those States Parties within whose territory the Enterprise established sub-offices. It was noted that the Enterprise was a commercial entity and should be treated like other commercial entities under the most-favoured-nation clause. It was agreed that the question of whether the privileges and immunities of the Enterprise should be separated from those of the Authority would depend on what the host country decided.

74/ Annex IV, art. 13 (4) (b).

75/ Annex IV, art. 13 (4) (c).

76/ Annex IV, art. 13 (4) (d).

Article 40

Special incentives, rights, privileges and immunities

States Parties may provide special incentives, rights, privileges and immunities to the Enterprise without the obligation to provide such incentives, rights, privileges and immunities to other commercial entities. 77/

Article 41

Tax status

The Enterprise shall negotiate with the host countries in which its offices and facilities are located for exemption from direct and indirect taxation. 78/

Article 42

Waiver

The Enterprise may waive any of the privileges and immunities conferred upon it under this section or in special agreements concluded by the Enterprise, to such extent and upon such conditions as it may determine. 79/

Section 14. PROCUREMENT

Article 43

Procurement

1. If the Enterprise does not possess the goods and services required for its operations it may procure them. For that purpose, it shall issue invitations to tender and award contracts to bidders offering the best combination of quality, price and delivery time.

2. If there is more than one bid offering such a combination, the contract shall be awarded in accordance with:

(a) The principle of non-discrimination on the basis of political or other considerations not relevant to the carrying out of operations with due diligence and efficiency; and

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77/ Annex IV, art. 13 (4) (e).

78/ Annex IV, art. 13 (5).

79/ Based upon Annex IV, art. 13 (7).

(b) Guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in developing States, including the land-locked and geographically disadvantaged among them.

3. The Governing Board may adopt rules determining the special circumstances in which the requirement of invitations to bid may, in the best interests of the Enterprise, be dispensed with. 80/

80/ Annex IV, art. 12 (3).